Supreme Court, U. S.
FILED
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MICHAEL RODAK, JR., CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1973

No. 73-477

RICHARD E. GERSTEIN, State Attorney for the Eleventh Judicial Circuit in and for Dade County, Florida,

Petitioner,

vs.

ROBERT PUGH and NATHANIEL HENDERSON, on their own behalf and on behalf of all others similarly situated,

and

THOMAS TURNER and GARY FAULK, on their own behalf and on behalf of all others similarly situated,

Respondents.

Appendix to Petition for Writ of Certiorari to United States Court of Appeals for the Fifth Circuit

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LEONARD MELLON
Assistant State Attorney for the Eleventh Judicial Circuit of Florida
E. JOSEPH DURANT, JR.
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Counsel for Petitioner

ROBERT MORRIS — [illegible] — [illegible]

ADDENDUM TO DOCKET ENTRIES

The following though not appearing in the docket entries in this case do constitute part of the official file of the United States Court of Appeals for the Fifth Circuit:

June 1, 1973—Letter from Fifth Circuit Court of Appeals To All Counsel of Record

June 8, 1973—Joint Memorandum In Response To Court's Letter of June 1, 1973.

September 18, 1973—Order of Fifth Circuit Court of Appeals granting motion for stay of mandate.

DOCKET ENTRIES

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22	Motion to Proceed in Forma Pauperis by Robert Pugh.	20- 21
22	Motion to Proceed in Forma Pauperis by Nathaniel Henderson.	22- 23
22	ORDER: Motion to proceed in forma pauperis by Nathaniel Henderson is GRANTED. (3/22/71-JLK)	24- 25
22	ORDER: Motion to proceed in forma pauperis by Robert Pugh is GRANTED. (3/22/71-JLK)	26- 27
25	Summons ret'd exec. 3/23/71 as to Rocky Pomerance.	28- 29
25	Summons ret'd exec. 3/23/71 as to Ralph Ferguson, Justice of the Peace.	30- 31
25	Summons ret'd exec. 3/23/71 as to Morton S. Perry, Judge, S.C. Court.	32- 33
25	Summons ret'd exec. 3/22/71 as to Bernard Garmire.	34- 35
25	Summons ret'd exec. 3/23/71 as to E. Wilson Purdy.	36- 37
25	Summons ret'd exec. 3/23/71 as to Jason Berkman, Justice of the Peace.	38- 39
25	Summons ret'd exec. 3/23/71 as to Sidney Segall, Judge, S.C. Court.	40- 41
25	Summons ret'd exec. 3/24/71 as to Charles Snowden, Justice of Peace.	42- 43

DOCKET ENTRIES (cont.)

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25	Summons ret'd exec. 3/23/71 as to Richard E. Gerstein.	44- 45
25	Summons ret'd exec. 3/25/71 as to David Maynard, Chief of Police of Hialeah.	46- 47
25	Summons ret'd etxec. 3/23/71 as to James Rainwater, Judge, S.C. Court	48- 49
29	Summons ret'd exec. 3/24/71 as to Sylvester Adair, J.P.	50- 51
29	Summons ret'd exec. 3/25/71 as to Ruth Sutton, J.P.	52- 53
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7	Answer of Bernard E. Garmire, Chief of Police, City of Miami.	68- 69
9	Notice of taking depositions of E. Wilson Purdy, Bernard Garmire, Rocky Pomerance and David Maynard.	70- 72
12	Motion of Thomas Turner and Gary Faulk to Intervene as Pltfs.	73- 75
12	Supporting Memo.	76- 77
12	Motion of Thomas Turner to Proceed in Forma Pauperis.	78- 79
12	Motion of Gary Faulk to Proceed in Forma Pauperis.	80- 81
12	Notice of Hearing on Motions to Intervene and Proceed in Forma Pauperis.	

DOCKET ENTRIES (cont.)

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12	Motion of Deft. Purdy to Dismiss.	95
12	Supporting Memo.	96-103
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12	Motions of Defts. RAINWATER, SUTTON for Summary Judgment.	104-107
12	Supporting Memo.	108-114
12	Notice of Hearing 5/10/71 @ 2 p.m.	
12	Answer of Defts. Rainwater and Sutton.	115-117
12	Answer of Deft. Sidney Segall.	118-119
12	Answer of Deft. Pomerance.	120-122
14	Answer, by deft. Morton L. Perry.	123-125
15	Motion of Dade County Bar Association for Leave to appear as Amicus Curiae, and Notice of hearing for 4/26/71 at 2:00	126-128
14	Answer of Deft. David Maynard.	129-130
16	Amended Answer of Deft. Sidney L. Segall.	131-132
21	Letter to Judge King from Richard E. Gerstein.	133-134
22	ORDER: Granting Leave to Appear as Amicus Curiae. (4/21/71-JLK)	135
27	Motion Pltf for Partial Summary Judgment.	136-137
27	Memo in Opposition to Deft. Gerstein's Motion for Summary Judgment and in support of Pltfs' Motion for Partial Summary Judgment.	138-147

DOCKET ENTRIES (cont.)

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27	Memo to Pltf in Opposition to Deft. Purdy's Motion to Dismiss.	148-149
27	Notice of hearing for 5/10/71 at 2:00	
28	Motion of Deft. Rocky Pomerance for Judgment on the Pleadings.	150
28	Memo in Support of Motion. (Certificate) of Service Attached)	151-155
28	Notice of hearing for 5/10/71 at 2:00.	
4	Depositions of David Maynard, Theodore Schempp and A.J. McLaughlin.	156-198
29	Motion of deft. Bernard Garmire for Judgment on the Pleadings.	199
29	Memo in support of Motion for Judgment on the Pleadings for the City of Miami Florida, filed by deft. Bernard Garmire.	200
29	Memo of Law, filed by City of Miami Beach.	201-203
29	Certificate of Service.	204-205
29	Notice of hearing for 5/10/71 at 2:00.	
5	Pltfs' Memo Opposing Motion for Judgment filed by Defts. Pomerance and Garmire.	206-210
6	Deposition of E. Wilson Purdy.	211-222
7	Certificate of Service, by defts.	223
10	Notice of add'l Authority, filed by pltfs.	224-225
11	Order resetting time for rehearing on 5/10/71 at 4:30	226
11	Memo of Amicus Curiae, Dade County Bar Association.	227-239

DOCKET ENTRIES (cont.)

Date	Proceedings	Pages
12	Memo of Amicus Curiae, Dade County Bar Association.	240-252
12	Notice of Add'l Authority, filed by deft., E. Wilson Purdy.	253-254
13	Letter from Peter L. Nimkoff to Judge King re memorandum.	255
14	ORDER: 1 Deft. Gerstein's Motion for Summary Judgment DENIED. 2. Deft. Purdy's Motion to Dismiss DENIED. 3. Motions of Defts. Garmire, Pomerance for Judgment on Pleadings DENIED. 4. Motion of Pltfs Turner, Faulk GRANTED. Their motion for forma pauperis GRANTED. 5. Pltfs' Motion for partial summary judgment against Deft Gerstein, taken under advisement. 6. Motion of counsel for Defts. Sutton and Rainwater to allow answer, motion for summary judgment and memo stand as pleadings for Deft. Adair GRANTED. 7. Motion od Deft. Gerstein to allow answer, Motion for summary Judgment to apply to intervenors, GRANTED. (5/13/71-JLK)	256-257
17	Affidavit of Sylvester P. Adair, Dade Justice of the Peace.	258

DOCKET ENTRIES (cont.)

Date	Proceedings	Pages
14	Order setting cause for final hearing and disposition on 6/14/71 at 10:30, with directions by the Court. (5/14/71-JLK)	259-260
28	Answer, filed by E. Wilson Purdy.	261-264
June		
1	Notice of taking deposition of James Reagan, Jr., Robert Morgan, Jack Sandstrom, Judge James Rainwater, Judge Ruth Sutton and Judge Sylvester Adair.	265-267
8	Deposition of Hon. James S. RAINWATER.	268-304
8	Deposition of Jack SANDSTROM.	305-314
8	Deposition of Robert E. MORGAN.	315-327
8	Deposition of JAMES REAGAN, JR. (See next entry for exhibit)	328-352
9	Letter from Legal Services Program to the Clerk enclosing "Caseload Report for the year ended 12/31/71", to be filed as an exhibit to the deposition of A. J. Regan, Jr. (Docket Entry No. 73).	353-354
9	Pltfs' Supplemental Memo.	355-366
10	Memo of Amicus Curiae, Dade County Bar Association.	367-378
14	Notice of taking deposition of Judge Ruth Sutton.	379-381
22	Notice of taking depositions of Morton L. Perry, Judge, and Sidney L. Segall, Judge.	382-384

DOCKET ENTRIES (cont.)

Date	Proceedings	Pages
22	Deposition of Deft. Ruth L. Sutton taken by Pltfs. 6/15/71.	385-448
15	Deposition of Sidney L. Segall.	423-448
July		
6	Motion for Separated Trials and Transfer of Parties and Memo by counsel.	449-450
6	Notice of Additional Authority filed by pltfs.	452-453
15	Deposition of Morton L. Perry.	454-468
16	Motion for Separate Trials and Transfer of Parties and Memo, by Deft. Charles Snowden.	469-470
Aug.		
11	Motion for Partial Summary Judgment, filed by Pltfs.	471-472
11	Memo in support of Motion for Partial Summary Judgment.	473-483
16	Reply Memorandum, filed by defendants.	484-487
Sept.		
12	OPINION & FINAL JUDGMENT: 1. This is a valid class action. 2. Named pltfs. shall be given a preliminary hearing to determine probable cause for their arrest by a committing magistrate unless their cases have been otherwise concluded. 3. Defts., with 60 days of date hereof,	

DOCKET ENTRIES (cont.)

Date	Proceedings	Pages
	shall submit to the Court a plan providing for preliminary hearings in all cases wherein prosecution is to be upon direct information. The preliminary hearing shall be within a reasonable time of the arrest. 4. Subsequent to final hearing certain motions for summary judgment, severance & transfer of party defts. to party pltf. were filed. These motions are hereby denied. 5. Court retains jurisdiction for a consideration of the plan & enforcement of the provisions of this final judgment. (10/12/71-JLK) R106	488-502
Nov.		
10	(Richard E. Gerstein, State Atty. for the Eleventh Judicial Circuit, Dade County, Florida, Deft.) Petition for rehearing and/or clarification and supporting memo of law.	503-510
12	Notice of Appeal filed by Pltfs. (The portion appealed includes only two paragraphs on page fourteen of the Opinion and Final Judgment) Copies mld. Judge Ruth L. Sutton; Duke Winsor and James Jorgensen; Barry Richard, Esq.; Judge Sidney Segall; Judge Ralph B. Ferguson, Jr.; Judge Sylvester P. Adair; Alan Diamond, Esq.; Judge Charles Snowden; Judge Jason Berkman; Rocky Pomerance	

DOCKET ENTRIES (cont.)

Date	Proceedings	Pages
	Chief of Police; Judge James Rainwater; Alan H. Rothstein, City Atty.; Bernard E. Garmire; Alden Berry and Judge Morton S. Perry, and U.S. Court of Appeals; Rogow.	511-512
14	Response To Petition For Re-Hearing or Clarification, by Pltfs.	513-518
Dec.		
13	Defendant E. Wilson Purdy's Plan providing for Preliminary Hearings.	519-529
14	Adoption of E. Wilson Purdy's Plan providing for Preliminary hearings. (Deft.).	530-531
16	ORDER: that a hearing to consider plan submitted by Deft., E. Wilson Purdy, set for Tues. 12-21-71, at 10:00 AM, before Judge King. (12-15-71-JLK).	532
21	Pltf's Response to Plan of E. Wilson Purdy.	533-537
21	Response to Deft. E. Wilson Purdy's Plan providing for Preliminary hearings. (Deft. James Rainwater.)	538-540
22	ORDER: This cause came on for consideration upon the Court's own motion, sua sponte, to extend the time for the transmittal by the clerk of the court of the record in this cause for purposes of appeal. In as much as this court has need for the use of said record for purposes of examining the proposed committing magistrate system as submitted to the	

DOCKET ENTRIES (cont.)

Date	Proceedings	Pages
	court by the Defts. in this cause, it is therefore, ORDERED that the time for transmitting the record on appeal is extended to February 1, 1972. (12-/22/71-JLK) Certified copy mailed to U.S. Court of Appeals.	541
1972 Jan.		
25	Order Adopting Plan to Provide Preliminary Hearings. (See Order for details. (1/25/72-JLK)	542-549
	CLERK'S CERTIFICATE.	550

Certified to be a true and correct copy of the original.

U.S. District Court
Joseph I. Bogart, Clerk
Southern Dist. of Fla.

By /s/ Ruth M. Hood
Deputy Clerk

Date: 1-20-72

UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF FLORIDA.

CASE NO. 71-448-Civ-JLK

ROBERT PUGH and NATHANIEL HENDERSON,
on their own behalf and on behalf
of all others similarly situated,

Plaintiffs,

vs.

JAMES RAINWATER, MORTON S. PERRY, SIDNEY SEGALL, Judges of the Small Claims Court in and for Dade County, Florida; RICHARD E. GERSTEIN, State Attorney for the Eleventh Judicial Circuit in and for Dade County, Florida; RUTH SUTTON, CHARLES SNOWDEN, JASON BERKMAN, RALPH FERGUSON, and SYLVESTER ADAIR, Justices of the Peace in and for Dade County, Florida; E. WILSON PURDY, Sheriff of Dade County, Florida; BERNARD E. GARMIRE, Chief of Police of the City of Miami, Florida; DAVID MAYNARD, Chief of Police of the City of Hialeah, Florida; ROCKY POMERANCE, Chief of Police of the City of Miami Beach, Florida,

Defendants.

COMPLAINT

[Filed March 22, 1971]

JURISDICTION

(1) This is an action brought by the plaintiffs on behalf of themselves and all others similarly situated for declaratory judgment and for preliminary and permanent injunction as authorized by Title 42 U.S.C. §1983 and 28 U.S.C. §§2201 and 2202. The jurisdiction of this Court is invoked under Title 28 U.S.C. §1343(3) and (4).

(2) The plaintiffs and all others similarly situated seek to secure the rights, privileges and immunities established by the Fourth Amendment and the Due Process and Equal Protection Clauses of the Fourteenth Amendment of [2] the Constitution of the United States. The plaintiffs and all others similarly situated have been deprived of such rights, privileges and immunities by: (1) the various defendants' refusal to provide preliminary hearings to judicially determine probable cause for incarcerating plaintiffs; and (2) the arbitrary and irrational procedures of defendants PURDY, GARMIRE, MAYNARD and POMERANCE, and their employees which creates two classifications of defendants—i.e., those who receive a preliminary hearing in Justice of Peace Courts and those who are denied such a hearing altogether; and (3) the defendant judges' imposition of monetary bail upon indigents as a condition of release from custody pending trial.

PARTIES

(3) Plaintiff, ROBERT PUGH, is a male citizen of the United States and of the State of Florida. He is presently incarcerated in the Dade County Jail charged with robbery, carrying a concealed weapon and possession of a firearm during the commission of a felony, and is awaiting trial in the Criminal Court of Record in and for Dade County, Florida. No bond has been set in his case pursuant to F.S.A. Const. Art., 1, §14 since the main pending charge is robbery.

(4) Plaintiff, NATHANIEL HENDERSON, is a male citizen of the United States and of the State of Florida. He is presently incarcerated in the Dade County Jail charged with breaking and entering, possession of narcotics, resisting arrest with violence and assault on a police officer, and is awaiting trial in the Criminal Court of Record in and for Dade County, Florida. Plaintiff remains incarcerated solely because he is financially unable to post the Four thousand Five hundred Dollar ($4,500.) bond set in his case.

[3] (5) The plaintiffs are members of a class composed of all persons arrested by law enforcement officers in Dade County, Florida, who are being detained in the Dade County Jail solely upon a direct information filed by the State Attorney for the Eleventh Judicial Circuit in and for Dade County, Florida, and who as a result have not been provided with: (1) an opportunity to be heard; (2) an opportunity to confront the witnesses against them; (3) an opportunity to have probable cause (if any exists) established by a judicial officer of the State of Florida. The persons in the class are so numerous that joinder of all persons is impractical; there are questions of law and fact common to the class; the claims of the representative parties are typical of the claims of the class; and the representative parties will fairly and adequately protect the interests of the class.

(6) Plaintiff HENDERSON also represents a class of persons who are incarcerated in the Dade County Jail solely because of their financial inability to post monetary bail as a condition of release pending trial. The persons in this class are so numerous that joinder of all persons is impractical; there are questions of law and fact common to the class; the claims of the representative party is typical of the claims of the class; and the representative party will fairly and adequately protect the interests of the class.

(7) Defendant RICHARD E. GERSTEIN, is the State Attorney for the Eleventh Judicial Circuit in and for Dade County, Florida. In such capacity he is charged with the authority and responsibility pursuant to Florida Statutes, Chapters 27 and 906 for filing informations against persons alleged to have committed criminal acts.

[4] (8) Defendants RUTH SUTTON, CHARLES SNOWDEN, JASON BERKMAN, RALPH FERGUSON and SYLVESTER ADAIR are Justices of the Peace in and for Dade County, Florida and in such capacity have the authority and responsibility pursuant to F.S.A. §901.01 and Rule 1.122 of the Florida Rules of Criminal Procedure to provide preliminary hearings for defendants accused of crimes in Dade County, Florida.

(9) Defendants JAMES RAINWATER, MORTON S. PERRY, and SIDNEY SEGALL are Judges of the Small Claims Court in and for Dade County, Florida, and in such capacity are empowered pursuant to F.S.A. §901.01 and Rule 1.122 of the Florida Rules of Criminal Procedure to provide preliminary hearings for defendants accused of crimes in Dade County, Florida.

(10) Defendant E. WILSON PURDY is the Director of the Public Safety Department, Dade County, Florida. In such capacity defendant PURDY, his agents, servants and employees enforce the statutes of the State of Florida and are responsible for arresting persons who allegedly have committed violations of said statutes.

(11) Defendant BERNARD E. GARMIRE is the Chief of Police of the City of Miami Police Department and in such capacity defendant GARMIRE, his agents, servants and employees enforce the statutes of the State of Florida and are responsible for arresting persons who allegedly have committed violations of said statutes.

(12) Defendant DAVID MAYNARD is the Chief of Police of the City of Hialeah, Florida and in such capacity defendant MAYNARD, his agents, servants and employees enforce the statutes of the State of Florida and are responsible for arresting persons who allegedly have committed violations of said statutes.

(13) Defendant ROCKY POMERANCE is the Chief of Police of the City of Miami Beach, Florida and in such capacity defendant [5] POMERANCE, his agents, servants and employees enforce the statutes of the State of Florida and are responsible for arresting persons who allegedly have committed violations of said statutes.

(14) At all times hereinafter mentioned, the acts complained of were carried out by the above named defendants, their agents, servants and employees in their official capacities under color of state law, regulation, custom and usage.

FACTS

(15) Plaintiff ROBERT PUGH, was arrested on March 3, 1971 and charge with robbery, carrying a concealed weapon and possession of a firearm during the commission of a felony. On March 4, 1971 he was presented to defendant SNOWDEN, who was sitting solely for the purpose of setting bond. Because plaintiff PUGH was charged with robbery, no bond was set pursuant to F.S.A. Const. Art., 1, § 14. At the bond hearing on March 4, 1971, no evidence was presented against the plaintiff to judicially determine probable cause for detaining the plaintiff.

(16) Thereafter an information charging plaintiff PUGH with robbery and other offenses was filed by defendant GERSTEIN with the Clerk of the Criminal Court of Record in and for Dade County, Florida. A copy of said information is attached hereto as Plaintiffs' Exhibit "A". Plaintiff was not present, nor given an opportunity to be heard, nor to cross examine, nor to confront the witnesses against him upon whose testimony the attached information was issued.

(17) Plaintiff NATHANIEL HENDERSON was arrested on March 2, 1971, and charged with breaking and entering, possession of narcotics, resisting arrest with violence and assault on a police officer. On March 3, 1971, he was presented to defendant [6] BERKMAN, who was sitting solely for the purpose of setting bond. Bond was set in the amount of $4,500. At the bond hearing on March 3, 1971, no evidence was presented against the plaintiff to judicially determine probable cause for detaining the plaintiff.

(18) Thereafter an information charging plaintiff HENDERSON with breaking and entering and other offenses was filed by defendant GERSTEIN with the Clerk of the Criminal Court of Record in and for Dade County, Florida. A copy of said information is attached hereto as Plaintiffs' Exhibit "B". Plaintiff was not present, nor given an opportunity to be heard, nor to cross examine, nor to confront the witnesses against him upon whose testimony the attached information was issued.

THE POLICIES AND PRACTICES COMPLAINED OF

COUNT I.

(19) It is the policy, pattern and practice of defendants PURDY, GARMIRE, MAYNARD and POMERANCE, and their agents, servants and employees to fail to present arrested persons before judges without unnecessary delay for the purpose of establishing probable cause at a preliminary hearing for the arrest of said defendant.

(20) It is the policy and practice of defendant GERSTEIN and his agents, servants and employees to file direct informations based upon testimony provided to an assistant state attorney by a police officer. Furthermore, it is the policy and practice of defendant GERSTEIN, his agents, servants and employees to refuse to provide a defendant in custody by virtue of a directly filed information an opportunity for a binding preliminary hearing to determine probable cause for his incarceration.

[7] (21) It is the policy and practice of defendants RUTH SUTTON, CHARLES SNOWDEN, JASON BERKMAN, RALPH FERGUSON, SYLVESTER

ADAIR, JAMES RAINWATER, MORTON S. PERRY, and SIDNEY SEGALL to refuse to provide a preliminary hearing to persons incarcerated in the Dade County Jail by virtue of a direct information filed by defendant GERSTEIN.

(22) The above described actions of the named defendants results in the incarceration of plaintiffs and members of their class solely upon a direct information filed by the state attorney and deprives said plaintiffs of their liberty without an opportunity to be heard, to confront the witnesses against them, or to have a judicial determination of probable cause made, all of which is in violation of the Fourth Amendment and the Due Process Clause of the Fourteenth Amendment to the Constitution of the United States.

COUNT II.

(23) Plaintiffs repeat and reallege the facts set forth in paragraphs 1 through 22 above.

(24) Defendants PURDY, GARMIRE, MAYNARD and POMERANCE, through their agents, servants and employees file charges upon persons they arrest with either a justice of the peace, in Dade County, Florida, or with the defendant, State Attorney GERSTEIN.

(25) If said charges are filed with the defendant State Attorney, then as set forth in Count I, the plaintiff is deprived of his right to a hearing based upon the direct information filed by the defendant GERSTEIN.

(26) If however, defendants PURDY, GARMIRE, MAYNARD and POMERANCE, through their agents, servants and employees choose to file the charges with a justice of the peace, then a pre- [8] liminary hearing will be accorded to the arrested person in due course.

(27) Defendants PURDY, GARMIRE, MAYNARD and POMERANCE, and their employees have unfettered discretion in choosing the authorities with whom they will file charges. No standards or rules guide said decisions.

(28) The actions of defendants PURDY, GARMIRE, MAYNARD and POMERANCE and their agents, servants and employees thereby creates two classes of arrested persons: (1) persons who are denied preliminary hearings because the arresting officer has filed charges directly with the State Attorney's Office, thereby causing an information to issue, and (2) persons who are granted preliminary hearings because the arresting officer has filed charges with one of the Justices of Peace of Dade County, Florida.

(29) The creation of these two classes of arrested persons is arbitrary, unreasonable and capricious. The plaintiffs and members of their class, who are being denied preliminary hearings, are thus denied equal protection of the laws in violation of the Fourteenth Amendment of the Constitution of the United States as a result of the irrational, unreasonable, arbitrary and capricious actions of the agents of defendants PURDY, GARMIRE, MAYNARD and POMERANCE.

COUNT III.

(30) Plaintiff HENDERSON repeats and realleges paragraphs 1, 2, 4, 6, 8, 9, 14 and 17 set forth above.

(31) It is the policy, pattern and practice of defendant judges RAINWATER, PERRY, SEGALL, SNOWDEN, SUTTON, FERGUSON, ADAIR and BERKMAN to set monetary bail upon persons presented before them as a condition of release pending trial.

[9] (32 Plaintiff HENDERSON has remained incarcerated since March 3, 1971, solely because of his financial inability to post the Four thousand Five hundred Dollar ($4500.) bail set to assure his future appearance.

(33) The actions of the defendant judges creates two classes of arrested persons: (1) persons who are financially able to post the monetary bail bonds set in their respective cases and thus secure their release from jail, and (2) persons who are financially unable to post the monetary bail bonds set in their respective cases and who must remain in jail solely because of their poverty.

(34) The creation of these two classes of arrested persons is arbitrary, unreasonable and capricious. It discriminates against poor persons solely because of their poverty without any rational basis. Plaintiff HENDERSON and members of his class are thus denied equal protection of the laws in violation of the Equal Protection Clause of the Fourteenth Amendment to the Constitution of the United States.

NATURE OF RELIEF

(35) There is between the parties and actual controversy as herein set forth. The plaintiffs and the classes they represent, are suffering irreparable injury and are threatened with irreparable injury in the future by reason of the acts herein complained of. The plaintiffs have no plain, adequate or complete remedy to redress the wrongs and unlawful acts herein complained of other than this action for declaration of rights and injunction. Any other remedies to which plaintiffs and members of their class can be remitted would be attended by such uncertainties and delays as to deny them substantial relief, would involve a multiplicity [10] of suits and cause further irreparable injury, damage and inconvenience of the plaintiffs. Unless the acts complained of are declared unconstitutional and enjoined by this Court, thousands of persons will be similarly incarcerated without an opportunity to be heard and solely because of their poverty in violation of the Due Process and Equal Protection Clauses of the Constitution of the United States in the same manner as plaintiffs herein.

PRAYER FOR RELIEF

WHEREFORE, plaintiffs respectfully pray on behalf of themselves and all others similarly situated that this Court assume jurisdiction of this cause and:

(1) Enter a declaratory judgment pursuant to Title 28 U.S.C. § § 2201, 2202 and Rule 57 of the Federal Rules of Civil Procedure declaring that the practices of the defendants GERSTEIN, RAINWATER, PERRY, SEGALL, SNOWDEN, FERGUSON, SUTTON, ADAIR and BERK-

MAN of refusing to provide a hearing to determine probable cause for plaintiffs and their class immediately after arrest violates the Fourth Amendment and the Due Process Clause of the Fourteenth Amendment to the Constitution of the United States.

(2) Enjoin defendants GERSTEIN, RAINWATER, PERRY, SEGALL, SNOWDEN, REGUSON, SUTTON, ADAIR and BERKMAN from failing to accord plaintiffs and members of their class due process hearings immediately after arrest to determine whether or not probable cause exists for the detention of the plaintiffs and their class.

(3) Enter declaratory judgment pursuant to Title 28 U.S.C. § § 2201, 2202 and Rule 57 of the Federal Rules of Civil Procedure declaring that the practices of the defendants PURDY, GARMIRE, MAYNARD and POMERANCE and their agents, servants and [11] employees of arbitrarily filing charges against plaintiffs and members of their class with the State Attorney for the Eleventh Judicial Circuit in and for Dade County Florida or the Justices of the Peace of Dade County, Florida, creates an arbitrary and irrational classification in violation of the Equal Protection Clause of the Fourteenth Amendment to the Constitution of the United States.

(4) Enjoin defendants PURDY, GARMIRE, MAYNARD and POMERANCE and their agents, servants and employees from arbitrarily filing charges upon plaintiffs and members of their class with the State Attorney for the Eleventh Judicial Circuit in and for Dade County, Florida or the Justices of the Peace of Dade County, Florida.

(5) Enter declaratory judgment pursuant to Title 28 U.S.C. § § 2201, 2202 and Rule 57 of the Federal Rules of Civil Procedure declaring that the practices of defendants, RAINWATER, PERRY, SEGALL, SNOWDEN, FERGUSON, SUTTON, ADAIR and BERKMAN of setting monetary bail upon plaintiffs and members of their class as a sole condition for their release pending trial results in an arbitrary and irrational discrimination in violation of the Equal Protection Clause of the Fourteenth Amendment of the Constitution of the United States.

(6) Enjoin defendants RAINWATER, PERRY, SEGALL, SNOWDEN, FERGUSON, SUTTON, ADAIR and BERKMAN from using monetary bail as the sole means of granting pre-trial release for plaintiffs and members of their class.

[12] (7) Grant such other and further relief as this Court may deem just and proper.

Respectfully submitted,

/s/ Bruce S. Rogow

BRUCE S. ROGOW, ESQUIRE
RENE V. MURAL, ESQUIRE
Legal Services of Greater Miami, Inc.
622 N. W.62 Street
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/s/ Phillip A. Hubbart

PHILLIP A. HUBBART
ESQUIRE
Public Defender of the Eleventh
Judicial Circuit of Dade County,
Florida
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Miami, Florida 33125
Tel: 377-7156

COUNSEL FOR PLAINTIFFS

[13]

VERIFICATION

STATE OF FLORIDA)
SS:
COUNTY OF DADE)

THE UNDERSIGNED having personally appeared before me, a Notary Public, and after being duly sworn, deposes and says that he is the named plaintiff in the foregoing complaint and that the facts alleged therein are true to the best of his knowledge, information and belief.

/s/ Robert W. Pugh

SWORN TO AND SUBSCRIBED before me, this 11 day of March, 1971.

/s/ E. L. Tribble

NOTARY PUBLIC,
STATE OF FLORIDA AT LARGE

My Commission expires:

Notary Public, State of Florida at Large. My commission expires Jan. 28, 1975. Bonded through Fred W. Diestelhorst.

[14]

VERIFICATION

STATE OF FLORIDA)
SS:
COUNTY OF DADE)

THE UNDERSIGNED having personally appeared before me, a Notary Public, and after being duly sworn, deposes and says that he is the named plaintiff in the foregoing complaint and that the facts alleged therein are true to the best of his knowledge, information and belief.

/s/ Nathaniel Henderson

SWORN TO AND SUBSCRIBED before me, this 11 day of March, 1971.

/s/ E. L. Tribble

NOTARY PUBLIC,
STATE OF FLORIDA AT LARGE

My Commission expires:

Notary Public, State of Florida at Large. My commission expires Jan. 28, 1975. Bonded through Fred W. Diestelhorst.

[54]

[TITLE OMITTED]

[Filed April 6, 1971]

ANSWER OF DEFENDANT RICHARD E. GERSTEIN

COMES NOW Richard E. Gerstein, State Attorney for the Eleventh Judicial Circuit in and for Dade County, Florida, and as his Answer to the Complaint states as follows:

. The defendant admits the allegations of paragraph one (1) of the Complaint.

2. The defendant denies the allegations of paragraph two (2) of the Complaint.

3. The defendant admits the allegations of paragraph (3) of the Complaint.

4. The defendant admits the allegations of paragraph four (4) of the Complaint with the exception of the last sentence thereof. The defendant is without [55] knowledge of the financial ability of the plaintiff Nathaniel Henderson and, therefore, cannot admit or deny the last sentence of paragraph four (4) of the Complaint.

5. The defendant admits the allegations of paragraph five (5) of the Complaint.

6. The defendant is without knowledge of the allegations of paragraph six (6) of the Complaint and, therefore, cannot admit or deny.

7. The defendant admits the allegations of paragraph seven (7) of the Complaint.

8. The defendant admits the allegations of paragraph eight (8) of the Complaint.

9. The defendant admits the allegations of paragraph nine (9) of the Complaint.

10. The defendant admits the allegations of paragraph ten (10) of the Complaint.

11. The defendant admits the allegations of paragraph eleven (11) of the Complaint.

12. The defendant admits the allegations of paragraph twelve (12) of the Complaint.

13. The defendant admits the allegations of paragraph thirteen (13) of the Complaint.

14. The defendant admits the allegations of paragraph fourteen (14) of the Complaint.

15. The defendant admits the allegations of paragraph fifteen (15) of the Complaint.

16. The defendant admits the allegations of paragraph sixteen (16) of the Complaint.

17. The defendant admits the allegations of paragraph seventeen (17) of the Complaint.

18. The defendant admits the allegations of paragraph eighteen (18) of the Complaint.

19. The defendant is without sufficient knowledge of the allegations contained in paragraph nineteen (19) so as to admit or deny the Complaint.

[56] 20. The defendant admits the allegations of paragraph twenty (20) of the Complaint.

21. The defendant is without sufficient knowledge of the allegations contained in paragraph twenty-one (21) so as to admit or deny the Complaint.

22. The defendant denies the allegations of paragraph twenty-two (22) of the Complaint.

23. The defendant repeats and realledges the Answers set forth in paragraphs one (1) throught twenty-two (22) above.

24. The defendant admits the allegations of paragraph twenty-four (24) of the Complaint.

25. In Answer to paragraph twenty-five (25) of the Complaint, the defendant admits that there is no hearing when charges are filed with the State Attorney, but denies that this constitutes any deprivation of any right of the plaintiffs or any class they may represent.

26. The defendant admits the allegations of paragraph twenty-six (26) of the Complaint.

27. The defendant denies the allegations of paragraph twenty-seven (27) of the Complaint.

28. The defendant denies the allegations of paragraph twenty-eight (28) of the Complaint.

29. The defendant denies the allegations of paragraph twenty-nine (29) of the Complaint.

30. In Answer to paragraph thirty (30) of the Complaint, the defendant repeats and realledges his Answer to paragraphs one (1), two (2), four (4), six (6), eight (8), nine (9), fourteen (14), and seventeen (17) set forth above.

31. The defendant is without sufficient knowledge of the allegations contained in paragraph thirty-one (31) so as to admit or deny the Complaint.

32. The defendant is without sufficient knowledge of the allegations contained in paragraph thirty-two (32) so as to admit or deny the Complaint.

[57] 33. The defendant denies the allegations of paragraph thirty-three (33) of the Complaint.

34. The defendant denies the allegations of paragraph thirty-four (34) of the Complaint.

WHEREFORE, the defendant Richard E. Gerstein, having answered the Complaint, prays that the Court enter a final judgment in his favor.

RICHARD E. GERSTEIN
STATE ATTORNEY

By: /s/ Jack R. Blumenfeld

JACK R. BLUMENFELD
Assistant State Attorney

[58]

[TITLE OMITTED]

MEMORANDUM OF LAW AND MOTION FOR SUMMARY JUDGMENT

COMES NOW the Defendant Richard E. Gerstein as State Attorney for the Eleventh Judicial Circuit in and for Dade County, Florida, by and through the undersigned Assistant State Attorney and moves this Court for a summary final judgment in his favor and states that there are no material disputed issues of fact and that the Defendant-Gerstein is entitled to a judgment in his favor for the reason stated in the attached Memorandum of Law.

/s.. Jack R. Blumenfeld

JACK R. BLUMENFELD, Esq.
Attorney for Defendant-Gerstein
Assistant State Attorney
Metropolitan Justice Building
1351 Northwest 12 Street
Miami, Florida 33125

[59]

[TITLE OMITTED]

MEMORANDUM OF LAW IN SUPPORT OF DEFENDANT-GERSTEIN'S MOTION FOR SUMMARY JUDGMENT

The undisputed facts in this case are as follows:

1. The Plaintiffs have both been charged with violations of the Florida Statutes.

2. They have been charged by Information (which Informations are attached to the Complaint as Exhibits A and B), as permitted by Article I, Section 15 (a) of the Florida Constitution.

3. That prior to the filing of the Information there was no Preliminary Hearing.

4. That the Informations were filed by the Defendant-Gerstein, or by one of his duly appointed Assistant State Attorneys, under and by his authority.

5. It is the policy and practice of the Defendant-Gerstein, his agents, servants and employees to [60] file Information based on independent examination of the facts, notwithstanding the result of any Preliminary Hearing, if any, and notwithstanding that there has been no Preliminary Hearing.

6. It is the policy and practice of the Defendant-Gerstein, his agents, servants, and employees to resist any attempt to have Preliminary Hearing after an Information has been filed or an indictment has been found.

* * *

[82]

[TITLE OMITTED]

COMPLAINT

JURISDICTION

(1) This is an action brought by the intervening plaintiffs on behalf of themselves and all others similarly situated for declaratory judgment and for preliminary and permanent injunction as authorized by Title 42 U.S.C. §1983 and 28 U.S.C. §§2201 and 2202. The jurisdiction of this Court is invoked under Title 28 U.S.C. §1343(3) and (4).

[83] (2) The intervening plaintiffs and all others similarly situated seek to secure the rights, privileges and immunities established by the Fourth Amendment and the Due Process and Equal Protection Clauses of the Fourteenth Amendment of the Constitution of the United States. The intervening plaintiffs and all others similarly situated have been deprived of such rights, privileges and immunities by: (1) the various defendants' refusal to provide preliminary hearings to judicially determine probable cause for incarcerating intervening plaintiffs; and (2) the arbitrary and irrational procedures of defendants PURDY, GARMIRE, MAYNARD and POMERANCE, and their employees which creates two classifications of defendants —i.e., those who receive a preliminary hearing in Justice of the Peace Courts and those who are denied such a hearing altogether; and (3) the defendant judges' imposition of monetary bail upon indigents as a condition of release from custody pending trial.

PARTIES

(3) Intervening plaintiff THOMAS W. TURNER, is a male citizen of the United States and of the State of Florida. He is presently incarcerated in the Dade County Stockade charged with auto theft, and is awaiting trial in the Criminal Court of Record in and for Dade County, Florida. He remains incarcerated solely because he is unable to post the $1,000 bond set in his case.

(4) Intervening plaintiff GARY FAULK, is a male citizen of the United States and of the State of California. He is presently incarcerated in the Dade County Stockade charged with possession of marijuana and soliciting a ride (hitchhiking) and is awaiting trial in the Criminal Court of Record in and for Dade County, Florida and the Metropolitan Court in and for Dade [84] County, Florida. He remains incarcerated solely because he is financially unable to post the $1,525 bond set in his case.

(5) The intervening plaintiffs are members of a class composed of all persons arrested by law enforcement officers in Dade County, Florida, who are being detained in the Dade County Jail or Stockade solely upon a direct information filed by the State Attorney for the Eleventh Judicial Circuit in and for Dade County, Florida, and who as a result have not been provided with: (1) an opportunity to be heard; (2) an opportunity to confront the witnesses against them; (3) an opportunity to have probable cause (if any exists) established by a judicial officer of the State of Florida. The persons in the class are so numerous that joinder of all persons is impractical; there are questions of law and fact common to the class; the claims of the representative parties will fairly and adequately protect the interests of the class.

(6) The intervening plaintiffs also represent a class of persons who are incarcerated in the Dade County Stockade or Jail solely because of their financial inability to post monetary bail as a condition of release pending trial. The persons in this class are so numerous that joinder of all persons is impractical; there are questions of law and fact common to the class; the claims of the representative parties are typical of the claims of the class; and the representative parties will fairly and adequately protect the interests of the class.

(7) Defendant RICHARD E. GERSTEIN, is the State Attorney for the Eleventh Judicial Circuit in and for Dade County, Florida. In such capacity he is charged with the authority and responsibility pursuant to Florida Statutes, Chapters 27 and 906 [85] for filing informations against persons alleged to have committed criminal acts.

(8) Defendants RUTH SUTTON, CHARLES SNOWDEN, JASON BERKMAN, RALPH FERGUSON and SYLVESTER ADAIR are Justices of the Peace in and for Dade County, Florida and in such capacity have the authority and responsibility pursuant to F.S.A. §901.01 and Rule 1.122 of the Florida Rules of Criminal Procedure to provide preliminary hearings for defendants accused of crimes in Dade County, Florida.

(9) Defendants JAMES RAINWATER, MORTON S. PERRY, and SIDNEY SEGALL are Judges of the Small Claims Court in and for Dade County, Florida, and in such capacity are empowered pursuant to F.S.A. §901.01 and Rule 1.122 of the Florida Rules of Criminal Procedure to provide preliminary hearings for defendants accused of crimes in Dade County, Florida.

(10) Defendant E. WILSON PURDY is the Director of the Public Safety Department, Dade County, Florida. In such capacity defendant PURDY, his agents, servants and employees enforce the statutes of the State of Florida and are responsible for arresting persons who allegedly have committed violations of said statutes.

(11) Defendant BERNARD E. GARMIRE is the Chief of Police of the City of Miami Police Department and in such capacity defendant GARMIRE, his agents, servants and employees enforce the statutes of the State of Florida and are responsible for arresting persons who allegedly have committed violations of said statutes.

(12) Defendant DAVID MAYNARD is the Chief of Police of the City of Hialeah, Florida and in such capacity defendant MAYNARD, his agents, servants and employees enforce the statutes of the State of Florida and are responsible for arresting persons who allegedly have committed violations of said statutes.

[86] (13) Defendant ROCKY POMERANCE is the Chief of Police of the City of Miami Beach, Florida and in such capacity defendant POMERANCE, his agents, servants and employees enforce the statutes of the State of Florida and are responsible for arresting persons who allegedly have committed violations of said statutes.

(14) At all times hereinafter mentioned, the acts complained of were carried out by the above named defendants, their agents, servants and employees in their official capacities under color of state law, regulation, custom and useage.

FACTS

(15) Intervening plaintiff THOMAS W. TURNER, was arrested on March 11, 1971 and charged with auto theft. On March 12, 1971 he was presented to defendant SNOWDEN, who was sitting solely for the purpose of setting bond. Bond was set in the amount of $1,000. At the bond hearing on March 12, 1971, no evidence was presented against the plaintiff to judicially determine probable cause for detaining the plaintiff.

(16) An information charging the intervening plaintiff TURNER with auto theft has been or will be filed by Defendant GERSTEIN with the Clerk of the Criminal Court of Record in and for Dade County, Florida. Intervening plaintiff will not be given an opportunity to be present, nor to be heard, nor to cross examine, nor to confront the witnesses against him upon whose testimony the information will be issued.

(17) Intervening plaintiff GARY FAULK was arrested on March 19, 1971 and charged with soliciting a ride (hitchhiking) and possession of marijuana. On March 20, 1971 he was presented to defendant RAINWATER who was sitting solely for the purpose of setting bond. Bond was set in the amount of $1,500 on the possession charge and $25 on the hitchhiking charge. At the bond hearing [87] on March 20, 1971 no evidence was presented against the intervening plaintiff to judicially determine probable cause for detaining him.

(18) An information charging intervening plaintiff FAULK with possession of marijuana has been or will be filed by defendant GERSTEIN with the Clerk of the Crim-

inal Court of Record in and for Dade County, Florida. Intervening plaintiff will not be given an opportunity to be present, nor an opportunity to be heard, nor to cross examine, nor to confront the witnesses against him upon whose testimony the information will be issued.

THE POLICIES AND PRACTICES COMPLAINED OF

COUNT I.

(19) It is the policy, pattern and practice of defendants PURDY, GARMIRE, MAYNARD and POMERANCE, and their agents, servants and employees to fail to present arrested persons before judges without unnecessary delay for the purpose of establishing probable cause at a preliminary hearing for the arrest of said defendant.

(20) It is the policy and practice of defendant GERSTEIN and his agents, servants and employees to file direct informations based upon testimony provided to an assistant state attorney for a police officer. Furthermore, it is the policy and practice of defendant GERSTEIN, his agents, servants and employees to refuse to provide a defendant in custody by virtue of a directly filed information an opportunity for a binding preliminary hearing to determine probable cause for his incarceration.

(21) It is the policy and practice of defendants RUTH SUTTON, CHARLES SNOWDEN, JASON BERKMAN, RALPH FERGUSON, SYLVESTER ADAIR, JAMES RAINWATER, MORTON S. PERRY, and SIDNEY [88] SEGALL to refuse to provide a preliminary

hearing to persons incarcerated in the Dade County Jail by virtue of a direct information filed by defendant GERSTEIN.

(22) The above described actions of the named defendants results in the incarceration of the intervening plaintiffs and members of their class solely upon a direct information filed by the state attorney and deprives said intervening plaintiffs of their liberty without an opportunity to be heard, to confront the witnesses against them, or to have a judicial determination of probable cause made, all of which is in violation of the Fourth Amendment and the Due Process Clause of the Fourteenth Amendment to the Constitution of the United States.

COUNT II.

(23) Plaintiffs repeat and reallege the facts set forth in paragraphs 1 through 22 above.

(24) Defendants PURDY, GARMIRE, MAYNARD and POMERANCE, through their agents, servants and employees file charges upon persons they arrest with either a justice of the peace, in Dade County, Florida, or with the defendant, State Attorney GERSTEIN.

(25) If said charges are filed with the defendant state attorney, then as set forth in Count I, the intervening plaintiffs are deprived of their right to a hearing based upon the direct informations filed by the defendant GERSTEIN.

(26) If however, defendants PURDY, GARMIRE, MAYNARD and POMERANCE, through their agents, servants and employees choose to file the charges with a justice of the peace, then a preliminary hearing will be accorded to the arrested person in due course.

(27) Defendants PURDY, GARMIRE, MAYNARD and POMERANCE, and their employees have unfettered discretion in choosing the [89] authorities with whom they will file charges. No standards or rules guide said decisions.

(28) The actions of Defendants PURDY, GARMIRE, MAYNARD and POMERANCE and their agents, servants and employees thereby creates two classes of arrested persons: (1) persons who are denied preliminary hearings because the arresting officer has filed charges directly with the State Attorney's Office, thereby causing an information to issue, and (2) persons who are granted preliminary hearings because the arresting officer has filed charges with one of the Justices of the Peace of Dade County, Florida.

(29) The creation of these two classes of arrested persons is arbitrary, unreasonable and capricious. The intervening plaintiffs and members of their class, who are being denied preliminary hearings, are thus denied equal protection of the laws in violation of the Fourteenth Amendment of the Constitution of the United States as a result of the irrational, unreasonable, arbitrary and capricious actions of the agents of defendants PURDY, GARMIRE, MAYNARD and POMERANCE.

COUNT III.

(30) Intervening plaintiffs repeat and reallege paragraphs 1, 2, 4, 6, 8, 9, 14 and 17 set forth above.

(31) It is the policy, pattern and practice of defendant judges RAINWATER, PERRY, SEGALL, SNOWDEN, SUTTON, FERGUSON, ADAIR and BERKMAN to set monetary bail upon persons presented before them as a condition of release pending trial.

(32) Intervening plaintiffs have remained incarcerated solely because of their financial inability to post the monetary bail set to assure their future appearances.

(33) The actions of the defendant judges creates two classes of arrested persons: (1) persons who are financially [90] able to post the monetary bail bonds set in their respective cases and thus secure their release from jail, and (2) persons who are financially unable to post the monetary bail bonds set in their respective cases and who must remain in jail solely because of their poverty.

(34) The creation of these two classes of arrested persons is arbitrary, unreasonable and capricious. It discriminates against poor persons solely because of their poverty without any rational basis. Intervening plaintiffs and members of their class are thus denied equal protection of the laws in violation of the Equal Protection Clause of the Fourteenth Amendment to the Constitution of the United States.

NATURE OF RELIEF

(35) There is beween the parties an actual controversy as herein set forth. The intervening plaintiffs and the classes they represent, are suffering irreparable injury and are threatened with irreparable injury in the future by reason of the acts herein complained of. The intervening plaintiffs have no plain, adequate or complete remedy to redress the wrongs and unlawful acts herein complained of other than this action for declaration of rights and injunction. Any other remedies to which intervening plaintiffs and members of their class can be remitted would be attended by such uncertainties and delays as to deny them substantial relief, would involve a multiplicity of suits and cause further irreparable injury, damages and inconvenience of the intervening plaintiffs. Unless the acts complained of are declared unconstitutional and enjoined by this Court, thousands of persons will be similarly incarcerated without an opportunity to be heard [91] and solely because of their poverty in violation of the Due Process and Equal Protection Clauses of the Constitution of the United States in the same manner as intervening plaintiffs herein.

PRAYER FOR RELIEF

WHEREFORE, intervening plaintiffs respectfully pray on behalf of themselves and all others similarly situated that this Court assume jurisdiction of this cause and:

(1) Enter a declaratory judgment pursuant to Title 28 U.S.C. §§2201, 2202 and Rule 57 of the Federal Rules of Civil Procedure declaring that the practices of the defendants GERSTEIN, RAINWATER, PERRY, SEGALL, SNOWDEN, FERGUSON, SUTTON, ADAIR and BERK-

MAN of refusing to provide a hearing to determine probable cause for intervening plaintiffs and their class immediately after arrest violates the Fourth Amendment and the Due Process Clause of the Fourteenth Amendment to the Constitution of the United States.

(2) Enjoin defendants GERSTEIN, RAINWATER, PERRY, SEGALL, SNOWDEN, FERGUSON, SUTTON, ADAIR and BERKMAN from failing to accord intervening plaintiffs and members of their class due process hearings immediately after arrest to determine whether or not probable cause exists for the detention of the intervening plaintiffs and their class.

(3) Enter declaratory judgment pursuant to Title 28 U.S.C. §§2201, 2202 and Rule 57 of the Federal Rules of Civil Procedure declaring that the practices of the defendants PURDY, GARMIRE, MAYNARD and POMERANCE and their agents, servants and employees of arbitrarily filing charges against intervening plaintiffs and members of their class with the State Attorney [92] for the Eleventh Judicial Circuit in and for Dade County, Florida or the Justices of the Peace of Dade County, Florida, creates an arbitrary and irrational classification in violation of the Equal Protection Clause of the Fourteenth Amendment to the Constitution of the United States.

(4) Enjoin defendants PURDY, GARMIRE, MAYNARD and POMERANCE and their agents, servants and employees from arbitrarily filing charges upon intervening plaintiffs and members of their class with the State Attorney for the Eleventh Judicial Circuit in and for Dade County, Florida or the Justices of the Peace of Dade County, Florida.

(5) Enter declaratory judgment pursuant to Title 28 U.S.C. §§2201, 2202 and Rule 57 of the Federal Rules of Civil Procedure declaring that the practices of defendants RAINWATER, PERRY, SEGALL, SNOWDEN, FERGUSON, SUTTON, ADAIR and BERKMAN of setting monetary bail upon intervening plaintiffs and members of their class as a sole condition of their release pending trial results in an arbitrary and irrational discrimination in violation of the Equal Protection Clause of the Fourteenth Amendment of the Constitution of the United States.

(6) Enjoin defendants RAINWATER, PERRY, SEGALL, SNOWDEN, FERGUSON, SUTTON, ADAIR and BERKMAN from using monetary bail as the sole means of granting pre-trial release for intervening plaintiffs and members of their class.

(7) Grant such other and further relief as this Court may deem must and proper.

Respectfully submitted,

/s/ Bruce S. Rogow

BRUCE S. ROGOW, ESQUIRE
RENE V. MURAI, ESQUIRE
Legal Services of Greater Miami, Inc.
622 N. W. 62 Street
Miami, Florida 33150

PHILLIP A. HUBBART, ESQUIRE
Public Defender
Metropolitan Justice Building
1351 N. W. 12 Street
Miami, Florida 33125

[93]

VERIFICATION

STATE OF FLORIDA)
) SS
COUNTY OF DADE)

THE UNDERSIGNED, having personally appeared before me, a Notary Public, and after being duly sworn, deposes and says that he is the named Plaintiff in the foregoing complaint and that the facts alleged therein are true to the best of his knowledge, information and belief.

/s/ Thomas W. Turner

SWORN TO AND SUBSCRIBED BEFORE me, this 31 day of March, 1971.

/s/ Eanet L. Leibble

Notary Public,
State of Florida at Large

My Commission Expires:

NOTARY PUBLIC, STATE of FLORIDA at LARGE. MY COMMISSION EXPIRES JAN. 28, 1975. Bonded through FRED W. DIESTELHORST.

[94]

VERIFICATION

STATE OF FLORIDA,)
) SS
COUNTY OF DADE,)

THE UNDERSIGNED, having personally appeared before me, a Notary Public, and after being duly sworn, deposes and says that he is the named plaintiff in the foregoing complaint and that the facts alleged therein are true to the best of his knowledge, information and belief.

/s/ Gary Faulk

SWORN TO AND SUBSCRIBED before me, this 30 day of March, 1971.

/s/ Earnest L. Liebble

Notary Public
State of Florida at Large
My Commission Expires:

NOTARY PUBLIC, STATE of FLORIDA at LARGE. MY COMMISSION EXPIRES JAN. 28, 1975. Bonded through FRED W. DIESTELHORST.

• • •

[14]

PUBLIC DEFENDER
Eleventh Judicial Circuit of Florida
Metropolitan Justice Building
1351 N.W. 12th Street
Miami, Florida 33125

PHILLIP A. HUBBART
Public Defender

Telephone
377-7166

May 12, 1971

The Honorable James L. King, Judge
United States District Court for the
Southern District of Florida
Main Post Office Building
Miami, Florida

RE: PUGH V. RAINWATER, CASE NO. 71-448-Civ-JLK

Dear Judge King,

In response to your Honor's request that the Plaintiffs and the State Attorney, in conjunction with the other local officials in the above-styled cause, confer for the purpose of working out arrangements to provide preliminary hearings for all persons arrested for state offenses in Dade County, Florida, Mr. Jack Blumenfeld, representing the State Attorney's Office, Phillip Hubbart, the Public Defender for Dade County and co-counsel for the Plaintiffs, and Mr. Bruce Rogow, co-counsel for the Plaintiffs, have conferred for the above stated purpose. Here are the results of our conversations.

1. It has not been possible for the parties to agree on procedures to immediately implement preliminary hearings for all persons charged with state offenses in Dade County, Florida. It is the State Attorney's position that it is impossible to provide such hearings immediately in all cases without cooperation of all elements of the criminal justice system and enabling legislation.

2. If the Court rules that preliminary hearings are constitutionally required for all persons arrested for state offenses in Dade County, Florida, the State Attorney would ask [15] that the State be given (90) days, from date of the Court's order or from the date of the mandate of an appellate Court should there be an appeal, to implement the provisions of this order. This ninety (90) day period is requested so as to make the necessary arrangements with local officials to provide such preliminary hearings and might act as impetus for the Florida State Legislature to pass pending legislation to provide a committing magistrate system for Dade County, Florida. The Plaintiffs have no objection to this request.

Respectfully submitted,

/s/ Jack A. Blumenfeld

JACK R. BLUMENFELD
Assistant State Attorney

/s/ Phillip A. Hubbart

PHILLIP A. HUBBART
Public Defender
PAH/fb

cc: Bruce Rogow, Esquire

Judge Sidney Segall

Judge Ralph B. Ferguson, Jr.

Barry Richard, Esquire

Alan H. Rothstein, Esquire

Alan Diamond, Esquire

Judge Morton S. Perry

Judge Charles Snowden

Judge Jason Berkman

• • •

[256]

[TITLE OMITTED]

ORDER

[Filed May 14, 1971]

THIS CAUSE came on to be heard before me on May 10, 1971, upon the various motions of defendants and plaintiffs. The Court had the benefit of memoranda and oral argument from counsel for the respective parties. Based upon said presentations, it is hereby

ORDERED and ADJUDGED:

1. The Motion for Summary Judgment by Defendant GERSTEIN is DENIED.

2. The Motion to Dismiss by Defendant PURDY is DENIED. Defendant PURDY shall have 20 days from the entry of this Order in which to file an Answer.

3. The Motions for Judgment on the Pleadings by Defendant GARMIRE and POMERANCE are DENIED.

4. The Motion to Intervene as Plaintiffs by THOMAS W. TURNER and GARY FAULK is GRANTED. The Motion of the Intervening Plaintiffs to proceed *in forma pauperis* is also GRANTED.

5. The Plaintiffs' Motion for Partial Summary Judgment against Defendant GERSTEIN is taken under advisement

6. The *ore tenus* Motion of counsel for Defendants SUTTON and RAINWATER to allow the Answer, Motion for Summary [257] Judgment and Memorandum of Law heretofore filed for those Defendants to stand as the pleadings for Defendant ADAIR is GRANTED.

7. The *ore tenus* Motion of Defendant GERSTEIN to allow his Answer, Motion for Summary Judgment and Memorandum to apply to the intervening Complaint is GRANTED. The pleadings of the Defendant GERSTEIN shall be deemed applicable to the intervenors.

DONE and ORDERED in chambers, at Miami, Dade County, Florida, this 13 day of May, 1971.

/s/ James Lawrence King

U. S. DISTRICT COURT JUDGE

[328]

[Filed June 8, 1971]

[TITLE OMITTED]

DEPOSITION OF JAMES REAGAN, JR.

The oral examination of James Reagan, Jr., taken pursuant to Notice of Taking Deposition on behalf of the Plaintiffs, before Melvin Gross, a Notary Public in and for the State of Florida at Large, on Thursday, the 3rd day of June, 1971, at 3:55 o'clock p.m., at the Office of the Public Defender, the Hon. Phillip A. Hubbart, 1351 Northwest 12th Street, Miami, Florida.

[329] APPEARANCES:

HON. PHILLIP A. HUBBART,
Public Defender, and
BENNETT H. BRUMMER, ESQ.
Assistant Public Defender, and
BRUCE ROGOW, ESQ. of
Legal Services,
622 Northwest 62nd Street,
Miami, Florida.
On behalf of the Plaintiffs.

HON. RICHARD E. GERSTEIN,
State Attorney.
By: JACK R. BLUMENFELD, ESQ.,
Assistant State Attorney.
On behalf of the Defendant Reagan.

BARRY RICHARD, ESQ.
Assistant Attorney General,
1350 Northwest 12th Avenue,
Miami, Florida.
On behalf of the Defendants
Rainwater, Sutton and Adair.

ALAN T. DIMOND, ESQ.
Assistant County Attorney,
1626 Dade County Courthouse,
Miami, Florida.
On behalf of Defendants
Sandstrom and Reagan.

[330]

INDEX

Witness	Direct	Cross
James Reagan, Jr.	3 (H)	—
	8 (R)	—
	15 (H)	—
	19 (R)	—
	22 (H)	—
	23 (R)	—

[331] Thereupon

JAMES REAGAN, JR.

a Defendant herein, was called as a witness by the Plaintiffs and, after having been first duly sworn, was examined and testified on his oath as follows:

DIRECT EXAMINATION

BY MR. HUBBART:

Q Would you state your name and official position, please?

A A. J. Reagan, Jr. I am the Administrative Officer for the State Attorney of this Judicial Circuit.

Q How long have you been so employed?

A About 20 months.

Q Mr. Reagan, at my request, did you make a search of the files and records of the State Attorney's Office to determine how many criminal charges had been no actioned by the State Attorney for the period of January 1st, 1970 through March 31st, 1971?

A I had it done under my direction.

Q Let me show you a memorandum, for the purpose of refreshing your recollection, concerning [332] the results of that search of the records. First of all, while you are looking at that, and while your Counsel is looking at that, could you tell me what a No Action Notice is?

A Yes. It is a statement by the State Attorney that he does not intend at this time, or at that time, to prosecute further a particular charge upon which a Defandant has been booked by a police officer.

Q And the determination is made by the State Attorney that there is not sufficient evidence at that time to proceed on that criminal charge?

A That is correct, or for some other reason. There might be some impediment to the prosecution at that time.

Q Could you tell me the results of this search of the records and this investigation that you made?

A Yes. We found that during the period of January 1st, 1970 through March 31st, 1971, we filed No Action Notices on eleven hundred and sixty-five individual charges.

Q Would you say that the vast majority [333] of these No Action Notices are the results of police officers arresting Defendants where there was not sufficient evidence to justify the filing of the charge,

A That is correct.

Q Could you tell me what the procedure is in the State Attorney's Office, as to how a case is No Actioned? What procedures are taken by the office before a determination is made that a charge should be No Actioned?

A Well, when the complainant appears before our Assistant to file the formal charge, to give us an affidavit concerning the facts of the case, the Assistant at that time evaluates the evidence —

Q When you say Assistant, you mean an Assistant State Attorney?

A That is correct. He evaluates the evidence and makes a determination of what the proper charge to file is. If there is a charge that we do not intend to file, then he will initiate this No Action Notice. It is then reviewed by the Chief of our Complaint Division.

[334] Q He is also an Assistant State Attorney?

A That is correct. And it is finally reviewed by the State Attorney, Mr. Gerstein.

Q So it goes through three separate people; two Assistant State Attorneys and the State Attorney himself, in determining whether or not a particular charge made by a police officer should be No Actioned, is that correct?

A That is correct.

Q When a decision is made that a charge will be No Actioned, then who is notified, if anybody?

A Well, we immediately notify the jail, if the Defendant is incarcerated. We send the original of the No Action to the Shift Commander of that particular shift of the jail. A copy is filed with the Clerk of the Criminal Court of Record and a copy is sent to the arresting officer, or the booking officer, and we keep a copy of it.

Q Now, if a Defendant is booked in on, say five charges, and there is a determination that three of these charges should be No Actioned, as I [335] understand the procedure, you would then notify the jail, if he is incarcerated, that you are going to No Action three of the five charges, and then you file an Information charging the Defendant with the remaining two charges?

A That is correct.

Q So the bonds that have been set by the Committing Magistrate, or from the Master Bond List, whatever, on the other three charges that you have No Actioned, would be dropped, is that correct?

A That is correct.

Q And the bonds would remain on the two charges that you filed?

A Well, no, it depends on what you mean by a bond. Do you mean if the bond would remain had the Defendant been released from jail?

Q I am talking about—

A —and already posted bond?

Q I am talking about incarcerated Defendants?

A No. The charges would be removed from the jail card and he would not be required to post bond on those charges, that is correct.

[336] Q So the bond would be dropped on the three charges and the other two charges he would have to post a bond in order to get out of jail, is that correct?

A That is correct.

MR. HUBBART: I have no further questions.

BY MR. ROGOW:

Q Mr. Reagan, how soon after a person is arrested does the police officer present himself before the State Attorney to file the Information?

A It varies in individual cases. From one day to several days.

Q When you say several days, more than five?

A On occasions, yes.

Q More than a week?

A On occasions, yes.

Q More than ten days?

A On occasions, yes.

Q More than two weeks?

A On occasions, yes.

Q More than a month?

[337] A I know of no such length of time as that.

Q But it would be somewhere between two weeks and a month that you have seen cases where no complainant presented himself to the Assistant State Attorney?

A I cannot recall of anything over two weeks, personally. Of course, I am not saying there have not been occasions. We have had rather extensive followup procedures to see that that does not happen.

I have one girl who does nothing all day but call police officers and say, "You arrested this man, come in and file."

Q How soon after the arrest does she begin to make the followup telephone calls?

A The next day. We have a rather elaborate system of cross-indexing our complaint. When a police officer comes to file, he is given a slip which is called a Referral Slip. It is a multicopy form and it has such information on it as the Defendant's name, the nature of the complaint, the person who is filing the complaint. We cross-index [338] these by both complaint and defendant.

The original slip goes with the complainant to the Assistant State Attorney. He takes the slip from him and, on the back of it, indicates what action he has taken on the complaint. If he intends to file the Information, he will write, "Information filed."

This slip is then routed back through this young lady in our Jail Records Section. She makes the followup call as soon as she gets the slip. She says, "The case is filed."

She then drops that one from consideration and follows up only on the ones that she hasn't got an Information on.

Q Those are only for jail cases?

A That is correct.

Q If a man is out on bond, there is no procedure to encourage the police officer to come in and file the Information right away?

A Unfortunately, I don't have the personnel for that sort of followup.

Q After a complaining witness, or a complaint is made, the police officer comes in and talks to an Assistant State Attorney, and then the [339] Assistant State Attorney prepares the Information, if he thinks one should be filed, is that correct?

A That is correct.

Q What does he do after that with that Information? Where does he go with that Information?

A First it goes through our Jail Records Section, as I mentioned before. The booking sheet is attached to the file at that point in time. It then goes to a processing section, to make sure that everything necessary for the prosecution of this case is contained in it.

Q How long does this processing take? That is what I am getting at.

A In jail cases, we expedite them anywhere from 24 to 72 hours.

Q What happens in these 24 to 72 hours?

A The assistant takes the complaint, the complaint

is processed for other information, such as corporate certificates or anything that we might need in court. Birth certificates, things of this nature. Then it is typed. Then it is sent back to the Assistant State Attorney that took the complaint for his approval.

[340] If it is proper, he initials it. It is then reviewed by the Chief of our Complaint Division who also initials it. Then it is sent to Mr. Gerstein, who signs it. It is then filed with the Clerk of the Criminal Court of Record.

Q You say that at the outside it is 72 hours?
A On jail cases, yes.

Q On jail cases?
A We allot absolute, top priority to jail cases. And the least priority we have, of course, are people out on bond.

Q When the Information is finally signed by Mr. Gerstein, or one of the other Assistants, it is then sent up to the Clerk of the Criminal Court of Record?
A That is correct.

Q It is then out of your hands at that point?
A That is correct.

Q You have no further contact with the Information, other than the general processes of the Court?
[341] A Well, except in so far as we prepare the calendar. As soon as the information is divisioned, by that I mean that a Judge is assigned to it and a case number is assigned to it, the Clerk notifies us of these two factors and we then set the jail cases. We then set it on the next day's calendar for arraignment.

Q So then you are depending upon when the Clerk gets the calendar and assigns it to a Judge?
A Before we can set it for arraignment, that is correct.

Q That is out of your control? That is strictly in the Clerk's control?
A That's right.

Q What happens if someone is arrested on Friday? Does that increase the length of time which the Information will be filed because of the weekend?
A Yes.

Q So that would increase the 72 hours to approximately two more days?
A You are talking about working days?

Q Yes.
[342] A Yes. It would be the nearest working day for our office.

Q So if a person were arrested on Friday, the Information might not be filed until the next Monday?
A It is possible.

Q And in bond cases, there is no timetable that you can give us?
A No, not at all.

Q Do you have any idea of the lag between arrest and —
A We try to keep within a three-week period. In other words, we have the Information filed three weeks after the arrest, I would say, 95 per cent of the bond cases.

Q Do you have any statistical breakdown on the percentage of cases in which you do have filed within 72 hours?

A No, sir, I don't.

Q Are there many cases which go beyond 72 hours?

A That is hard for me to say, Mr. Rogow. I really don't know.

[343] MR. BLUMENFELD: You are referring to these eleven hundred and sixty-five No Action Notices and this procedure refers to direct files, is that correct?

THE WITNESS: That is correct. Where arrests had been made without warrants.

MR. BLUMENFELD: And if the officer elects to go to the Justice of the Peace and there is a bind-over from the Justice of the Peace and the Assistant elects not to file it, that is not included in these eleven hundred and sixty-five No Action Notices?

THE WITNESS: That is correct, it is not included.

MR. BLUMENFELD: That is another form of notice, is that correct?

THE WITNESS: That is correct.

BY MR. HUBBART:

Q Mr. Reagan, where the police officer does not file directly with the State Attorney's Office, but goes through the Justice of the Peace Court and files a com-

plaint there, could you tell us what the procedures are, in so far as the State [344] Attorney's Office is concerned, after the case has been bound over? How do you handle that?

A Certainly we — the Justice of the Peace transmits all of these papers to the Clerk of the Criminal Court of Record.

Q After they held a preliminary hearing on the matter?

A That is correct. This is assuming there is a bind-over. The Clerk of the Criminal Court of Record sends us copies of all these papers. It is assigned to an Assistant who investigates, to determine the proper charge to file. After that determination is made, an Information is filed in that particular case. In this instance we already have a division and a case number so we don't have the communication problem.

In the event that the Assistant decides that there is insufficient evidence to file an Information, or for any other reason he declines to file an Information, he institutes a Notice called a No Information. This is a report similar to a No Action Notice. He sets forth the reasons why he is declining to file an Information in this case.

[345] It is approved the same way the No Action is approved. Then the oral announcement is made in open court and that closes the JP bind-over, in so far as the Criminal Court is concerned.

Q What is the lag in time, between the time of arrest and the JP bind-over case, and the time that the JP

finally gets the papers to you and you file an Information against the Defendant? Do you have any approximation on that?

A Anywhere from seven days to six weeks. Yes.

Q And that is between the time of the arrest of the Defendant and the time of the filing of the Information?

A That is correct.

Q Could you give us an approximation as to the length of time in a No Action case, the length of time between the time of the Defendant's arrest and the time that the matter is finally No Actioned?

A I would say, in the great majority of cases, between three and five days.

Q Of course, a weekend arrest would lengthen that time by two days?

[346] A I am speaking of working days.

Let me point out, too, that most of these No Actions don't terminate the arrest. In other words, something is filed.

Q That was just like I was talking about the five charges where you may drop three and file on two, in which case the bond is dropped on the three for the incarcerated defendants?

MR. BLUMENFELD: That likewise holds true on No Information.

MR. REAGAN: On a No Information, there is another problem involved. The JP's, historically, have only

one charge per case. They make separate cases out of every affidavit. They only put one charge on an affidavit. So if the police officer goes in and charges a man with breaking and entering and grand larceny from the house he broke and entered, that comes out to two cases in the JP Court. It goes to the Criminal Court and it stays two cases.

Once it gets to us, we consolidate it by filing one Information on one of the cases, charging both crimes and we have to No Information the [347] second case.

It is really a misnomer. That is, we are filing a No Information in one cause of action but we are terminating the second case for the record. And that happens in a great number of cases.

Q The Clerk of the Criminal Court of Record of Dade County is taking over the printing and preparing of the calendar, are they not?

A Hopefully.

Q That will happen this summer. So that you will no longer have the responsibility of notifying the Clerk as to a particular Defendant that you filed an Information on, that you need the division and the number?

A That is correct.

Q And then putting him on the calendar shortly after you get that Information back from the Clerk?

A That is correct.

MR. HUBBART: That's all I have.

BY MR. ROGOW:

Q Along the same lines, Mr. Reagan, after you file the Information with the Clerk, how [348] long does it take him, if you know, to assign it to the division, get it on the calendar, and then get it back to you so that you will know it is going to appear in court?

A That varies greatly. From as little time as the same day.

If we file an Information early in the morning, it is possible that we would be notified that afternoon of the division, the number — I have also seen the work backlogged so that it takes as much as a week.

Q Between the time you bring it over there and the time it is back on the calendar?

A Right.

MR. BLUMENFELD: No, not that it gets back on the calendar, that we get notified of the case number and the division so that we cannot put it on the calendar.

Q (By Mr. Rogow) How long after you get notified does it take you to put it on the calendar?

A We put it on the calendar the next available day. Of course, you understand, if we get [349] this notice after three o'clock in the afternoon, then it cannot go on the next day's calendar. You have got another 24 hour period.

Q What I want to try to get from you is that at the time the complaining party comes to you, everything starts at that time for you?

A Yes.

Q There is nothing you can do before that? From the time the complaining party comes to you, how much time elapses, usually, before the case is put on the calendar and the Defendant appears in court?

A My notice would be — the average would be between ten and fifteen days.

Q Ten and fifteen days?

A Yes.

Q Plus whatever time it took for the complainant to come into your office?

A That is correct.

Q And if the man is in jail, he stays in jail during all that time and he doesn't see a Judge at all in that time, except for the bonding judge that he saw the first morning?

[350] A That is correct.

(Thereupon a discussion was held off the record.)

BY MR. HUBBART:

Q These No Actions figures that you have given us, the eleven hundred and sixty-five, is that in reference to incarcerated Defendants?

A No, sir. Not all of these are incarcerated Defendants.

MR. BLUMENFELD: Excuse me. Not all of these are Defendants. Not all eleven hundred and sixty-five are Defendants. That is eleven hundred and sixty-five counts.

Q (By Mr. Hubbart) Of the eleven hundred and sixty-five, from the No Actions filed from January 1st, 1970, until March 31st, 1971, this refers to the incarcerated Defendants as well as non-incarcerated Defendants?

A That is correct. We also use this in order to clear bonds. For example, a Defendant is arrested and posts a bond on five charges, we only elect to prosecute him on two charges, and in order to release the bond on the other three charges, we [351] use this vehicle of a No Action.

Q Do you have any idea, any approximation as to the number of incarcerated Defendants who are incarcerated—

Let me rephrase that. There are eleven hundred and sixty-five individual charges; do you have any idea of what percentage would involve incarcerated Defendants?

A No, sir, I don't.

BY MR. ROGOW:

Q Mr. Reagan, do you have any idea of how many cases are nol pros'd after an Information is filed? In other words, somewhere along the way a decision is made by the State Attorney's Office not to proceed after the Information is filed?

A Not in that particular category. I have statistics on how many cases are terminated by dismissal, nol pros'd or No Information.

Q Could you get those statistics for us, unless you have them in your head?

A No, I haven't. If you will excuse me, I will get them now.

Q Are they written?

[352] A Yes, they are in writing.

Q Would you give us a memorandum on that, where your statistics show that, and we will attach that as an exhibit to the deposition?

MR. BLUMENFELD: You want the calendar year 1970 as a base?

MR. HUBBART: That is all right. Could you give us any breakdown, also, on these eleven hundred and sixty-five, how many of these involved incarcerated Defendants, if there is any way of determining that?

THE WITNESS: I could count them.

MR. HUBBART: I would like for you to do that, if you don't mind.

THE WITNESS: I don't mind.

MR. HUBBART: I have no further questions.

MR. ROGOW: No further questions.

MR. BLUMENFELD: No questions.

(Reading, signing and notice of filing were waived by the witness.)

(Thereupon the taking of the deposition was concluded at 4:15 p.m.)

CERTIFICATE OF NOTARY

STATE OF FLORIDA)
) SS:
COUNTY OF DADE)

I, MELVIN GROSS, a Notary Public in and for the State of Florida at Large, hereby certify that I reported the deposition of JAMES REAGAN, JR., at the time and place hereinabove set forth; that the witness was first duly sworn by me; that the foregoing pages numbered from 1 to 24, inclusive, constitute a true and correct transcription of my stenographic report of the deposition of said witness.

I FURTHER CERTIFY that I am neither attorney nor counsel for, nor related to or employed by any of the parties connected with the action, nor financially interested in the action.

WITNESS my hand and seal in the City of Miami, Dade County, Florida, this 6th day of June, 1971.

/s/ Melvin Gross

Notary Public

[353]

[Filed June 9, 1971]

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Legal Services Program, inc.

622 n.w. 62nd Street
miami, florida 33150
telephone 759-1608
(area code 305)

June 9, 1971

Clerk
United States District Court
300 N.E. First Avenue
Miami, Florida

RE: PUGH V. RAINWATER
Case No. 71-488-Civ-JLK

Dear Sir:

Enclosed please find a "Caseload Report for the Calendar Year Ended December 31, 1971" from the office of the State Attorney for the Eleventh Judicial Circuit. This is to be filed as an exhibit to the deposition of A. J. Regan, Jr., already on file with the Court.

Very truly yours,

/s/ Bruce S. Rogow

BRUCE S. ROGOW, ESQUIRE

cc: Jack R. Blumenfeld, Esquire
Alan Diamond, Esquire
Barry Richard, Esq.
BSR/mlj

[354]

STATE ATTORNEY, ELEVENTH JUDICIAL CIRCUIT CASELOAD REPORT FOR THE CALENDAR YEAR ENDED DECEMBER 31, 1970

Cases	In Process Fiscal Year 1/1/70	Add New Cases for Quarter— From Informations	and Indictments	Dispositions Since 1/1/70	In Process At Period 12/31/70
Capital Offenses	65	93	158	90	68
Other Non-Capital Felonies	21,403	12,804	34,207	5,401	28,806
Misdemeanors	12,760	3,741	16,501	2,365	14,136
TOTAL CASES	34,228	16,638	50,866	7,856	43,010
TOTAL NUMBER of PERSONS NA					
TOTAL NUMBER OF CASES BOUND OVER					

Dispositions	Totals
No True Bills	
Nolle Pros	194
Plea of Guilty	(3,234)
Convictions	4,716
Acquittals	1,565
*Other (Absentee Docket, etc.)	1,373
TOTAL DISPOSITIONS	7,856

*Guilty Pleas included in convictions.
(*) If these cases are reactivated at a future date, treat as new cases.

Other Matters	
Appeals to Higher Courts	311
Bond Validations	15
Bond Estreatures	1,918
Extradition Proceedings	68
Rule I Motions	160
Criminal Hearings	12,771
Habeas Corpus Hearings	159
Uniform Support Procedures	1,250
Other Cases Not Enumerated (Specify)	1,696
TOTAL OTHER MATTERS	18,348

(Signature)

Note: One form may be used for all four quarters. Just erase or Sno-Pake totals from the previous quarter, list the new quarter, then add Cases In Process at the beginning of the year; after subtracting dispositions since the beginning of the year, a new total of Cases In Process at the ending of the new quarter will be obtained.

Distribution: Four copies to Judicial Administrative Commission — which will retain one, and forward one each to the Governor's Office, the Attorney General, and the Budget Director.

[TITLE OMITTED]

[Filed July 6, 1971]

MOTION FOR SEPARATE TRIALS AND TRANSFER OF PARTIES AND MEMORANDUM

Plaintiffs and Defendants, James Rainwater, Ruth Sutton, and Sylvester P. Adair, hereby jointly move this Court to order a separate trial on the issue of bail, raised by Count III of the Complaint and to grant leave to said defendants to transfer from party defendants to party plaintiffs on the issue of preliminary hearings, raised by Counts I and II of the Complaint, and as grounds therefor states:

1. The two issues are factually and legally unrelated.

2. Said defendants in their memoranda and in oral argument have argued in favor of the plaintiffs' position on the preliminary hearing issue.

3. It is apparent from the pleadings that judgment against the defendants Rainwater, Sutton and Adair is not necessary in order for the plaintiffs to obtain the relief they seek on the preliminary hearing issue.

4. Transfer of the defendants Rainwater, Sutton and Adair from parties defendant to parties plaintiff would clarify the positions of the parties for the remainder of the

litigation in [450] this court and on appeal should one be taken.

Respectfully submitted,
BRUCE S. ROGOW, ESQUIRE
Legal Services of Greater
Miami, Inc.
622 N.W. 62nd Street
Miami, Florida 33150

PHILLIP A. HUBBART,
ESQUIRE
Public Defender of the Eleventh
Judicial Circuit
Metropolitan Justice Building
1351 N.W. 12th Street
Miami, Florida 33125

By /s/ Phillip A. Hubbart

ROBERT L. SHEVIN
Attorney General

/s/ Barry Scott Richard

BARRY SCOTT RICHARD
Chief Assistant Attorney General
1350 N.W. 12th Avenue, Rm 530
Miami, Florida

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Motion for Separate Trials and Transfer of Parties was mailed to the parties listed below this 25th day of June, 1971.

Howard Levine and
James Jorgensen
Legal Unit
1320 N.W. 14th Street
Public Safety Dept.,
Miami, Florida

Bruce Rogow, Esq.
Legal Services of Greater
Miami
622 N.W. 62nd St.
Miami, Fla., 33150

Judge James Rainwater
1351 N.W. 12th St.
Room 444
Miami, Florida

Alan Diamond, Esq.
Assistant County Attorney
73 West Flagler Street
Miami, Florida

Judge Sidney Segall
1351 N.W. 12th St.,
Miami, Florida

Morton S. Perry, Judge
1351 N.W. 12 St.
Room 440
Miami, Florida

Ralph B. Ferguson, Jr.,
Justice of the Peace
2001 N.W. 7th Street
Miami, Florida

Charles Snowden
Justice of the Peace
12210 N.W. 7th Ave.
Miami, Fla.

Sylvester P. Adair
Justice of the Peace
432 Washington Avenue
Homestead, Florida

Ruth L. Sutton
Justice of the Peace
220 Miracle Mile
Coral Gables, Fla.

Rocky Pomerance
Chief of Police
City of Miami Beach
100 Meridian Avenue
Miami Beach, Florida

Jason Berkman
Justice of the Peace
407 Lincoln Road
Miami Beach, Fla.

[451]

Bernard E. Garmire
Chief of Police for the
City of Miami
1145 N.W. 11th Street
Miami, Florida

David Maynard
Chief of Police for the
City of Hialeah
Hialeah, Florida

Alan H. Rothstein
City Attorney
Larry J. Hirsch,
Asst. City Attorney
65 S.W. 1st Street
Miami, Florida 33130

Jack R. Blumenfeld, Esq.
Asst. State Attorney
1351 N.W. 12th Street
Miami, Florida 33125

/s/ Barry Scott Richard

BARRY SCOTT RICHARD
Chief Assistant Attorney General
Miami Division

[469]

[TITLE OMITTED]

[Filed July 16, 1971]

MOTION FOR SEPARATE TRIALS AND TRANSFER OF PARTIES AND MEMORANDUM

Defendant, Charles H. Snowden, hereby joins in the Motion of defendants James Rainwater, Ruth Sutton, and Sylvester P. Adair and plaintiffs, for separate trials on the issues of preliminary hearings and bail and to transfer said defendants from party-defendants to party-plaintiffs on the issue of preliminary hearings and defendant, Charles H. Snowden, hereby adopts the Memorandum filed with said Motion.

ROBERT L. SHEVIN
Attorney General

/s/ Barry Scott Richard

BARRY SCOTT RICHARD
Chief Assistant Attorney General
1350 N.W. 12th Avenue, Rm 530
Miami, Florida
Attorneys for Defendant,
Charles H. Snowden

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Motion was mailed to the parties listed below, this 14th day of July, 1971.

Howard Levine and
James Jorgensen
1320 N.W. 14th Street
Public Safety Dept.,
Miami, Florida

Morton S. Perry,
Judge
1351 N.W. 12th St.
Room 440
Miami, Florida

Sylvester P. Adair
Justice of the Peace
432 Washington Avenue
Homestead, Florida

[470]
Judge James Rainwater
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Room 444
Miami, Florida

Alan Diamond, Esq.
Asst. County Attorney
73 W. Flagler Street
Miami, Florida

Judge Sidney Segall
1351 N.W. 12th St.,
Miami, Florida

Phillip A. Hubbart
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David Maynard
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Miami Beach, Florida

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Miami, Florida 33125

/s/ Barry Scott Richard

BARRY SCOTT RICHARD
Chief Assistant Attorney General

[488]

[TITLE OMITTED]

[Filed Oct. 12, 1971]

OPINION AND FINAL JUDGMENT

Plaintiffs Robert Pug and Nathaniel Henderson brought this class action, in which plaintiffs Thomas Turner and Gary Faulk have intervened, seeking relief for the alleged deprivation of their rights as secured by the Fourth and Fourteenth Amendments to the Constitution of the United States. Jurisdiction is founded upon 28 U.S.C. 1343 (3), (4) and grows out of a Constitutional attack (42 U.S.C. 1983) upon the procedure whereby plaintiffs were incarcerated, upon information filed by the state attorney, and held for trial in Dade County, Florida, without review by a committing magistrate of the probable cause for their arrest.

The defendants herein are sued in their official capacities (sheriff, police chiefs, state attorney, justices of the peace and judges of small claims courts of Dade County and several of its municipalities) as individuals charged with the responsibility of administering the system under which plaintiffs were incarcerated.

The plaintiffs contend that they have been deprived of a Constitutional right to a preliminary hearing before a judicial officer to determine whether there is probable cause that they committed the offenses with which they are charged.

Under the present procedure the state attorney (or one of his assistants) considers the reports submitted [489] by police officers of the results of their investigations and thereafter files a direct information and issues a capias for arrest of the individual charged with the offense. The person may be already in jail or is then arrested and waits in jail until either he is released on bond or is tried. There is no review by a judicial officer as to the probable cause for the arrest and detention of a person charged by the state attorney in a direct information.

Plaintiffs further allege they have been denied their constitutionally protected right to equal protection of the law in that in certain instances the police will process cases through the offices of the justices of the peace instead of going to the office of the state attorney as was done herein. A justice of the peace conducts a preliminary hearing for probable cause whereas the state attorney does not. It is contended that the unfettered discretion of the police in deciding whether to file criminal charges with the justice of the peace or the state attorney, results in an arbitrary and unreasonable creation of two classes of arrested persons, those who are afforded a preliminary hearing and those who are not.

Lastly plaintiffs contend that the setting of a monetary bail bond as a condition for the release of persons financially unable to post the bond creates two classes of arrested persons and discriminates against poor persons, thereby violating their right of equal protection of the law. Plaintiffs Henderson, Turner and Faulk allege they remain imprisoned because of their impoverished financial conditions.

In the case of plaintiff Pugh no bond has been set pursuant to F.S.A. Constitution, Article 1, §14 since the main pending charge is robbery, a crime punishable by life imprisonment, F.S.A. 813.011.

[490] On May 13, 1971 the Court, upon the request of all counsel took the plaintiff's pending motions for summary judgment under advisement for the purpose of permitting the Florida Legislature an opportunity to consider pending legislation providing for the type of probable cause hearing sought herein. The Legislature adjourned without enacting the proposed statute and this case was set for final hearing. In the course of arguing their respective positions during final hearing, all counsel agree that there are no issues of fact to be resolved in this suit and that the issues can, and should, be determined as a matter of law.

Consistant with the philosophy of non-intervention in state criminal procedures the Court afforded the parties a reasonable time, subsequent to the final hearing, within which to attempt to agree upon the implementation of a system securing to all persons the protection of judicial review of the probable cause for arrest. This proved fruitless. The time of restraint is past and the Court has no alternative except to act.

UNDISPUTED FACTS

A person may be charged with a crime in Dade County, Florida, in one of five ways:

(1) A police officer witnesses the commission of a crime, places the accused under arrest and

takes him to jail. Sometime between 24 hours and two weeks later the arresting officer files a sworn affidavit with the office of the state attorney who, then files a direct information and issues a capias against the defendant.

(2) A police officer conducts an investigation of an alleged criminal offense, decides he has sufficient evidence to arrest, and places the defendant in jail. The arresting officer then goes to the state attorney with his affidavit and a direct information is filed against the defendant by the state attorney.

(3) A police officer conducts an investigation but takes the case to the state attorney before making the arrest and, after issuance of the direct information, arrests the defendant and places him in jail.

(4) A police officer conducts an investigation, [491] presents the matter by affidavit to a justice of the peace, who issues a warrant for arrest and conducts a preliminary hearing to determine probable cause as to the commission of the alleged crime. The defendant is released if no probable cause is found to exist.

(5) The results of an investigation are submitted by the state attorney to the grand jury, which determines probable cause and returns an indictment to a judge. After review, the judge either issues the arrest warrant and causes the indictment to be filed or dismisses the charge.

Under the process outlined in paragraphs 1, 2, and 3 above there is no judicial determination, prior to trial of whether or not there is probable cause to believe that the particular defendant under arrest did in fact, commit the offense for which he is being held in custody. The procedures outlined in paragraphs 4 and 5 provide for a probable cause hearing, by a judicial officer, prior to trial and are not therefore under attack in this litigation.

When an accused person is informed against by the state attorney and arrested, processing of the information does not begin until the arresting officer appears before an assistant state attorney and files his affidavit of facts. In spite of the fact that officers are urged to file their affidavit with the state attorney as promptly as possible periods from twenty-four hours to more than two weeks elapse before the affidavit is filed and processing begins.

The state attorney, between January 1, 1970 and March 31, 1971, decided not to file direct informations in 1,165 cases in which a person had been charged or arrested as a result of police investigation. The majority of these "no actions" resulted from arrests on charges lacking sufficient evidence to justify the filing of an information.

Obviously, a judicial officer considering probable cause on a preliminary hearing would have promptly disposed of all of these cases with a tremendous saving of human misery (to all those who had been arrested on insufficient evidence) and of tax dollars (to the average citizen who is paying for the cost of a vastly overcrowded jail facility in Dade County, Florida).

[492] Once the state attorney's office decides to file the information a period of twenty-four to seventy-two hours plus weekends is required to prepare the information for filing with the Clerk of the Criminal Court of Record. The information is then filed and set for arraignment with an average delay of ten to fifteen days from the time the arresting officer appears until the time the defendant is arraigned.*

At no time prior to trial is a defendant who is proceeded against by information afforded a hearing to determine the existence of probable cause. It is the policy of the state attorney to oppose any attempt to secure such a hearing.

JURISDICTION

Where the Federal Court is asked to pass upon the validity of state criminal procedures, the question of jurisdiction requires careful scrutiny. Defendants urge that the Federal Anti-Injunction Statute, 28 U.S.C. 2283, along with the recent Supreme Court decisions in a series of cases led by Younger v. Harris, 401 U.S. 37, 91 S. St. 746 (1971), remove this cause from the Court's jurisdiction. See, Boyle v. Landry 400 U.S. 77, 91 S. Ct. 758, (1971); Dyson v. Stein, 400 U.S. 200, 91 S. Ct. 769 (1971); Samuels v. Mackell, 400 U.S. 66, 91 S. Ct. 674 (1971); Perez v. Ledesma, 400 U.S. 82, 91 S. Ct. 674 (1971); Byrne v. Karalexix, 400 U.S. 216, 91 S. Ct. 777 (1971).

*Although the record does not reflect the ultimate disposition of the direct information cases alone, it does appear that of the total of 7,256 cases disposed of by the state attorney in 1970, there were 198 "nolle pros", and 1,565 acquittals.

The Anti-Injunction Statute provides that "A court of the United States may not grant an injunction to stay proceedings in a State Court except as expressly authorized by Act of Congress, or where necessary in aid of its jurisdiction, [493] or to protect or effectuate its judgments", 28 U.S.C. §2283. The Younger case rested not upon an interpretation of this statute and the exceptions thereto but upon "the national policy forbidding Federal Courts to stay or enjoin pending State Court proceedings except under special circumstances", 401 U.S. at 41.

Under Younger, et al as well as under the statute the relief precluded is the enjoining of a prosecution or a declaratory judgment with the same effect, Samuels v. Mackell, supra. Moreover, in each of the Younger cases the requested relief included a declaration of unconstitutionality of a state substantive criminal statute. Plaintiffs at bar ask the Court neither to declare unconstitutional a state statute nor to enjoin a prosecution, but instead pray for a declaration of procedural rights and an injunction from the continued denial thereof. This case is therefore not in conflict with either Younger or 28 U.S.C. §2283. Furthermore, even were the relief requested herein considered to be within Younger, the circumstances of this case would come within the exceptions to that principle.

Mr. Justice Black outlined in Younger the circumstances under which a Federal Court can enjoin a state criminal proceeding. There must be a "great and immediate" "irreparable injury" other than the "cost, anxiety, and inconvenience of having to defend against a single criminal proceeding. There must be a "great and immecannot be eliminated by the defense therein, 401 U.S. at 46, S. Ct. at 751. Although Younger recognizes that

jurisdiction would exist where a state prosecution was brought in bad faith or for harrassment, as in Dombrowski v. Pfister, 380 U.S. 479 (1965), it is clear that these factors are not additional prerequisites to relief but are indicative of irreparable injury. See also Duncan v. Perez, No. 31089, 5 Cir. June 14, 1971. [494] In describing the harassment present in Dombrowski, the Court noted that "[t]hese circumstances . . . sufficiently establish the kind of irreparable injury sufficient to justify federal intervention", 401 U.S. at 48, 91 S. Ct. at 752.

Plaintiffs at bar are challenging the validity of their imprisonment pending trial with no judicial determination of probable cause. These facts present an injury which is both great and immediate and which goes beyond cost, anxiety, and inconvenience. Furthermore, the state has consistently denied the right asserted, so that the injury is irreparable in that it cannot be eliminated either by the defense to the prosecution or by another state proceeding. See Anderson v. State, 241 So.2d 390 (Fla. 1970); Sangaree v. Hamlin, 235 So.2d 729 (Fla. 1970); Montgomery v. State, 176 So.2d 331 (1965); Bangus v. State, 141 So.2d 264 (1962)*. For the reasons stated the Court finds that it has jurisdiction in this cause.

CONSTITUTIONAL QUESTIONS

The principal constitutional issue for determination is, of course, whether one who is arrested and held for trial upon an information filed by the state attorney is entitled to a hearing before a judicial officer on the question of probable cause.

*The case law cited relates only to count I of the complaint. Lengthy consideration of counts II and III is unnecessary in light of the holdings which follow.

The Court is faced with a unique factual situation which does not appear to be controlled by the plethora of cases cited by counsel. Defendants rely on Woom v. Oregon, 229 U.S. 586, 33 S. Ct. 783 (1914) in which the Supreme Court held that an Oregon defendant who was accused by sworn complaint [495] before a committing magistrate had no right to an examination as a condition precedent to the filing of an information by the district attorney. In Woom the Court was concerned with the validity of the information rather than the pre-trial detention. Furthermore, that case did not consider a procedure resulting in lengthy detention after arrest where neither a sworn complaint nor an information had been filed.

It is significant that the Woom case relied on Hurtado v. California, 110 U.S. 516, 4 C. Ct. 111 (1884) holding that a grand jury indictment was not a prerequisite to a felony prosecution, and stating:

> . . . we are unable to say that the substitution for a presentment or indictment by a grand jury of the proceeding by information after examination and commitment by a magistrate, certifying to the probable guilt of the defendant with the right on his part to the aid of counsel, and to the cross-examination of the witnesses produced for the prosecution, is not due process of law." (emphasis added) 110 U.S. at 537, 4 S. Ct. at 122.

Numerous opinions have been cited in which this circuit has held there is no due process right to a preliminary hearing. The issue in each of those cases however, was the validity of the trial as affected by the absence of a preliminary hearing and not the validity of the

pre-trial detention itself. In Scarborough v. Dutton, 393 F.2d 6 (5 Cir. 1968) the Court, upholding a conviction where the defendant had been incarcerated for seven months without a preliminary hearing, stated, "The failure to hold a preliminary hearing, without more, does not amount to a violation of constitutional rights which would vitiate the subsequent conviction". 393 F.2d at 7 (emphasis added). See also: Murphy v. Beto, 416 F.2d 98 (5 Cir. 1969); McCoy v. Wainwright, 396 F.2d 818 (5 Cir. 1968); King v. Wainwright, 368 F.2d 57 (5 Cir. 1966); Worts v. Dutton, 395 F.2d 341 (5 Cir. 1968); Kerr v. Dutton, 395 F.2d 79 (1968); cf. Hamilton v. Alabama, [496] 368 U.S. 52, 82 S.Ct. 157 (1961).

In Anderson v. Nosser, 438 F.2d 183 (5 Cir. 1971), even though the Court did not consider the validity of a conviction, the facts were analogous to those in the foregoing post-conviction cases. In each case cited supra the pre-trial detention had ceased to exist, and the trial itself being valid, there was no continuing deprivation of rights. The confinement in Anderson occurred over a period of two to four days with the various federal complaints being filed from three months to fourteen months after plaintiffs' release. Consequently, in Anderson, just as in the post conviction cases the Court was asked to grant relief from a deprivation of rights no longer in effect. That the Anderson Court itself considered the case to come within the post conviction situation is apparent from its reliance upon Kulyk v. U.S., 414 F.2d 139 (5 Cir. 1969), and other cases, all of which turned upon the validity of a conviction, 438 F.2d at 196.

The instant case differs from the foregoing in that this Court is asked to determine the validity of a present

confinement. The complaint herein was filed during plaintiffs' incarceration. Unlike Anderson, the confinement at bar is not an isolated event but is a recurring part of the state sanctioned prosecutorial system. Unless corrected the wrong complained of will continue to infringe upon the rights of the individual plaintiffs and the class they represent.

A criminal system wherein the individual faces prolonged imprisonment upon the sole authority of the police and/or prosecutor violates the principles which underly this country's founding and which are the essence of the constitutional guarantees of freedom from unreasonable seizure and from deprivation of liberty without due process of law.

[497] The danger inherent in a system of this kind was described by Mr. Justice Frankfurter in McNabb v. United States:

> [L]egislation requiring that arrested persons be promptly taken before a committing authority, appears on the statute books of nearly all of the states.
>
> The purpose of this impressively pervasive requirement of criminal procedure is plain. A democratic society, in which respect for the dignity of all men is central, naturally guards against the misuse of the law enforcement process. Zeal in tracking down crime is not itself an assurance of soberness of judgment. Disinterestedness in law enforcement does not alone prevent disregard of cherished liberties. Experience

> has therefore counseled that safeguards must be provided against the dangers of the overzealous as well as the despotic. The awful instruments of the criminal law cannot be entrusted to a single functionary. The complicated process of criminal justice is therefore divided into different parts, responsibility for which is separately vested in the various participants upon whom the criminal law relies for its vindication. Legislation such as this, requiring that the police must with reasonable promptness show legal cause for detaining arrested persons, constitutes an important safeguard — not only in assuring protection for the innocent but also in securing conviction of the guilty by methods that commend themselves to a progressive and self-confident society. 318 U.S. 332, 343-44, 63 S. Ct. 608, 614 (1943).

Over forty years ago the Florida Legislature (1939) enacted a statute requiring any officer arresting without a warrant to take the defendant before a committing magistrate without unnecessary delay. F.S.A. 901.23. Thus we see the requirement for a preliminary hearing is not a new innovation in the law of the State of Florida.

The Fourteenth Amendment provides that no state shall deprive any person of liberty without due process of law. The fundamental requisite of due process of law is the opportunity to be heard. Grannis v. Ordean, 234 U.S. 385, 34 S. Ct. 779, (1914). "It is an opportunity which must be granted at a meaninguful time and in a meaningful manner." Armstrong v. Manzo, 380 U.S. 545, 552, 85 S. Ct. 1187, 1191 (1965).

[498] It has been held that a hearing must be given before a drivers license and vehicle registration can be suspended, Bell v. Burson, 91 S. Ct. 1586 (1971); Salkay v. Williams, No. 30090 (5 Cir. June 22, 1971); before prohibiting the sale of liquor to an individual for one year, Wisconsin v. Constantineau, 400 U.S. 433, 91 S. Ct. 507; before termination of welfare payments (even though a subsequent hearing was afforded), Goldberg v. Kelly, 397 U.S. 254, 90 S. Ct. 1011 (1970); before garnishment of wages (even though there was a subsequent trial), Snidach v. Family Finance Corp., 395 U.S. 337, 89 S. Ct. 1920 (1969); before a thirty day suspension from a public school, Williams v. Dade County School Board, 441 F.2d 299 (5 Cir. 1971); before refusal of admission to public hospital staff, Sosa v. Board of Managers, 437 F.2d 173 (5 Cir. 1971); and before termination of employment on college faculty, Ferguson v. Thomas, 430 F.2d 852 (5 Cir. 1970). It would appear beyond question that due process demands a preliminary hearing within a reasonable time after an accused has been deprived of his freedom.

In Goldberg v. Kelly, the Court summarized the test for providing procedural due process as follows:

> The extent to which procedural due process must be afforded the recipient is influenced by the extent to which he may be "condemned to suffer grievous loss." Joint Anti-Facist Refugee Committe v. McGrath, 341 U.S. 123, 168, 71 S. Ct. 624, 647, (1951) (Frankfurter J., concurring), and depends upon whether the recipient's interest in avoiding that loss outweighs the governmental interest in summary adjudication. 397 U.S. 254, 262-63, 90 S. Ct. 1011, 1017-18.

In this case the grievous loss is that one's freedom and the countervailing governmental interest is that of the state in avoiding the burden of preliminary hearings. Although the state may incur additional expense in expanding its existing committing system to include hearings for direct information cases, this expense will be more than offset by the savings in jail and [499] trial costs regarding those persons heretofore jailed and/or tried without probable cause. Moreover, these financial considerations are so grossly overbalanced by the prolonged loss of freedom by innocent persons that further comment is unnecessary.

The taxpayers of this community have labored under a near intolerable burden of the spiraling cost of combating crime. The expense of maintaining a jail, with many persons who would never be there in the first instance if their case had been reviewed by a judge in an effective committing magistrate system, will be substantially less than its present cost and will certainly be a tangible benefit to all citizens of this community.

A preliminary hearing in direct information cases is compelled by the Fourth Amendment as well as by the Fourteenth Amendment.

The Fourth Amendment provides that "The right of the people to be secure in their persons . . . against unreasonable searches and seizures, shall not be violated, and no warrants shall issue but upon probable cause, supported by oath or affirmation . . ." It has been established that this amendment is operable upon the states via the due process clause of the Fourteenth Amendment, Mapp. v. Ohio, 367 U.S. 643, 81 S. Ct. 1684 (1961) and that it

applies to arrest warrants as well as to search warrants. Giordenello v. U.S., 357 U.S. 480, 78 S. Ct. 1245 (1958).

The existence of a Fourth Amendment right to a probable cause hearing has been recognized in two opinions of the Court of Appeals for the District of Columbia Circuit. In Cooley v. Stone, 134 U.S. App. D.C. 317, 414 F.2d 1213 (1969) the Court held that a juvenile in the custody of a detention home had the right to a probable cause hearing and cited approvingly the following language of the lower court:

[500] No person can be lawfully held in penal custody by the state without a prompt judicial determination of probable cause. The Fourth Amendment so provides and this constitutional mandate applies to juveniles as well as adults. 414 F.2d at 1213.

In Brown v. Fauntleroy, 442 F.2d 838 (1971) the Court found that the same right applied to a juvenile released pending trial to the custody of his mother. In that opinion the Court emphasized that the basis of the right was in the Constitution and not in the Federal Rules of Criminal Procedure. Of the fact that the accused was not in physical state custody the Court said;

> "[T]he right to be free of a seizure made without probable cause does not depend upon the character of the subsequent custody. Appellant accordingly has the right to have the validity of the seizure determined since he will be called to trial for conduct which led to the seizure." 442 F.2d at 842.

Recently the Supreme Court overturned a State Court conviction based upon evidence seized under a search warrant issued by the state attorney general who was the chief investigator and prosecutor in the case. The warrant was held to be invalid under the Fourth and Fourteenth Amendments because not issued by the "neutral and detached magistrate required by the Constitution", Coolidge v. New Hampshire, 400 U.S. 814, 91 S.Ct. 2022 (1971). If a prosecuting official cannot properly issue a search warrant in a case he is prosecuting, then he is a fortiori not a proper person for determining the existence of probable cause to hold an accused for trial.

The Court finds that under the Fourth and Fourteenth Amendments, arrested persons, whether or not released on bond, have the constitutional right to a judicial hearing on the question of probable cause.

Count II alleges that the system which denies a preliminary hearing to plaintiffs' class while granting [501] a hearing to other criminal defendants is violative of the right to equal protection of the law. Because of the Court's holding that in all direct information cases the accused must be given a hearing as a right of due process and freedom from unreasonable seizure, it is unnecessary for the Court to determine whether the prior system was invalid for failure to afford equal protection of the law. See Troy State University v. Dickey, 402 F.2d 515 (5 Cir. 1968).

Plaintiffs contend in count III that where an accused is financially unable to post the required security for his release pending trial there exists an arbitrary and unreasonable classification based solely upon wealth in viola-

tion of the right to equal protection of the law. The record establishes that it is the policy of defendants to set bonds sufficiently low to allow accused persons their release while assuring their subsequent appearance at trial. The severity of the crime along with the accused's ties to the community, past criminal record, and financial resources are all considered in the setting of bonds. There is no allegation that any bond in question was set in excess of that which the judiciial officer deemed necesary to assure trial appearance.

In contending that they are denied release solely because of their poverty, plaintiffs ignore the other factors distinguishing them from released persons. The record shows that plaintiffs' confinement is not the result of a classification based solely upon wealth, consequently they have not been deprived of their right to equal protection of the law.

The Court recognizes the cooperative attitude of the state authorities and their desire to comply with the law. Obviously they are the individuals most qualified to develop the new procedures required by this order. It is hereby suggested that the assistance of Presiding Circuit Judge Marshall C. Wiseheart in the implementation of this [502] this order would be helpful. It is therefore,

ORDERED and ADJUDGED:

1. That this is a valid class action brought pursuant to Rule 23 (b) (2), Federal Rules of Civil Procedure, on behalf of all persons arrested in Dade County who are or will be proceeded against by direct information of the state attorney.

2. The named plaintiffs shall immediately be given a preliminary hearing to determine probable cause for their arrest by a committing magistrate unless their cases have been otherwise concluded.

3. That defendants shall, within 60 days of the date hereof, submit to the Court a plan providing for preliminary hearings before a judicial officer empowered to act as committing magistrate in all cases wherein prosecution is to be upon direct information. The preliminary hearing shall be within a reasonable time of the arrest.

4. Subsequent to final hearing certain motions for summary judgment, severance and transfer of party defendants to party plaintiff were filed. These motions be and the same are hereby denied.

5. The Court retains jurisdiction for a consideration of the plan and enforcement of the provisions of this final judgment.

DONE and ORDERED in chambers at Miami, Florida, this 12th day of October, 1971.

/s/ James Lawrence King

JAMES LAWRENCE KING
UNITED STATES
DISTRICT JUDGE

cc: Counsel of Record

[542]

[TITLE OMITTED]

[Filed January 25, 1972]

ORDER ADOPTING PLAN TO PROVIDE PRELIMINARY HEARINGS

In its Opinion and Final Judgment in this cause entered October 12, 1971, the Court directed defendants to submit a plan providing for preliminary hearings before a judicial officer in all criminal cases in Dade County wherein prosecution is to be upon direct information of the State Attorney. A single plan having been submitted, that being on behalf of Defendant E. Wilson Purdy, and the Court having provided all parties with the opportunity for oral argument regarding said plan, it is

ORDERED AND ADJUDGED:

I. That the aforesaid plan, as modified by the Court, shall be the official plan for implementation of the Court's final judgment, said modified plan being as follows:

1. The purpose of this plan is to provide every arrested person (hereinafter defendant) who is to [543] be proceeded against by direct information of the State Attorney immediate access to a committing Magistrate who shall conduct a first appearance hearing for the following purposes: (A) To advise the defendant of the charges against him; (B) To advise the defendant of his rights under the Constitution of the United States and the Constitution of the State of Florida; (C) To appoint

counsel if the defendant is indigent; (D) To set a date and time for a preliminary hearing to determine whether there is probable cause that the defendant committed the offense with which he is charged.

2. All procedings will be conducted pursuant to Florida Statutes, the Florida Rules of Criminal Procedure and the applicable case law.

3. All arrested persons who are subject to "booking" will be booked at the Metropolitan Dade County Jail.

4. All officers who make an arrest, with or without a warrant, shall immediately take the arrested person, or where that is not feasible cause him to be taken, before a Magistrate for a first appearance hearing. Absent extreme circumstances said hearing shall take place within three (3) hours of the time the defendant is taken into custody.

5. The Chief Judge for the Eleventh Judicial Circuit in and for Dade County shall designate sufficient Judges, who will sit as a committing magistrate division.

6. A committing magistrate will be available for first appearance hearings on a twenty-four (24) hour basis seven (7) days per week.

[544] 7. All first appearance hearings will be held in the courtroom or chambers of the designated committing magistrate.

8. At the first appearance hearing the magistrate will set the time and place for a preliminary hearing to determine whether there is probable cause to hold the defendant for trial. If both the State of Florida, represented by the office of the State Attorney, and the defendant, properly represented by counsel, are prepared to proceed with the preliminary hearing, the magistrate shall immediately conduct such a hearing. If either party is not prepared for the preliminary hearing said hearing shall not be set to take place within a period of twenty-four (24) hours after the first appearance hearing unless the parties agree to a time within that period. Except in extreme circumstances the preliminary hearing will be set to take place not more than four (4) days after the first appearance hearing for all defendants who are unable to post bond and do not qualify for the Pre-Trial Release Program and not more than ten (10) days after the first appearance hearing for all other defendants.

9. A defendant may waive his right to a preliminary hearing or agree to a hearing date that is later than the time hereinabove set forth, provided that such a waiver is signed by the accused and his legal counsel, if any.

10. There will be provided sufficient assistant state attorneys available at the first appearance hearing and at the preliminary hearing to assist officers in drafting the charges against the arrested person and to otherwise represent the position of the State of Florida at said proceedings.

[545] 11. There will be provided sufficient assistant public defenders to represent, both at the first hearing

and at the preliminary hearing, those persons who are entitled to public representation.

12. The magistrate shall allow the defendant a reasonable time to obtain counsel and for such purposes shall, if necessary, postpone setting the preliminary hearing for a period not to exceed forty-eight (48) hours. He shall also, upon request of the defendant, require an officer to communicate a message to such counsel in Dade County as the defendant may name. The officer shall with diligence and without cost to the defendant perform that duty. If the defendant desires private counsel and private counsel cannot be obtained within a reasonable time the magistrate shall continue the cause and release the defendant on his own recognizance, in the custody of another or on bond, or the magistrate may order incarceration of the defendant. If incarceration is ordered, the magistrate must immediately schedule a preliminary hearing to be held within four (4) days. If the magistrate finds the defendant to be indigent, he shall appoint a public defender to represent him.

13. Upon information or complaint under oath the magistrate may arraign the defendant and may accept a plea of guilty or nolo contendere to any offense within the jurisdiction of the Court. If the charged offense is not within the jurisdiction of the Court the magistrate shall set a hearing for the purpose of accepting the plea before a Court with appropiate jurisdiction.

14. Preliminary hearings may be held in any court of competent jurisdiction, such location is to be set by the magistrate at the time of the first appearance hearing.

[546] 15. The magistrate, where he has appropriate jurisdiction, may, upon appropriate plea, sentence any defendant either at the first appearance or at the preliminary hearing.

16. If, at the time of the preliminary hearing, it appears to the magistrate that there is probable cause that an offense has been committed and that the defendant committed it, the magistrate shall forthwith order the defendant to answer to the Court having trial jurisdiction; otherwise the magistrate shall discharge the defendant.

17. If the magistrate discharges the defendant, the defendant shall not be required to answer to a subsequent charge for the same offense(s) except upon an indictment by the Grand Jury which shall have been returned within thirty (30) days of the defendant's discharge.

18. If the magistrate orders the defendant to answer to the Court having trial jurisdiction, he may release the defendant on his own recognizance, in the custody of another, or on bond, or he may order the defendant to be incarcerated. For purposes of the preliminary hearing the magistrate shall issue such process as may be necessary to secure the attendance of witnesses within the state for the state or the defendant. All witnesses shall be examined in the presence of the defendant and may be cross examined. At the conclusion of the testimony for the prosecution, the defendant shall, if he so elects, be sworn and testify in his own behalf and in such a case he shall be warned in advance by the magistrate that anything he may say can be used against him at a subsequent trial. He may be cross examined and whether

he testified or not any witness produced by him shall be sworn and examined.

[547] Prior to the examination of any witness in the cause the magistrate may, and on request of the defendant shall, exclude from the courtroom all other witnesses who have not yet testified. The magistrate may cause the witnesses to be kept separate and prevented from communicating with one another until all are examined.

At the request of the prosecuting attorney or the defense attorney the testimony of the witnesses and the defendant, if he testified, shall be recorded verbatim stenographically or by mechanical means and shall be transcribed, and furnished to the requesting attorney. If the testimony or any part thereof is transcribed at the request of either party, a copy of such testimony shall be furnished at cost to the other party. If the defendant is indigent, transcriptions shall be furnished free of cost upon request by the defense attorney.

When the magistrate has discharged the defendant or held him to answer he shall transmit within forty-eight (48) hours thereafter to the clerk of the court having trial jurisdiction of the offense the following information as applicable:

(a) The name of the incarcerated person awaiting trial, the date of incarceration and the charge.

(b) The complaint and the warrant.

(c) The written testimony of the witnesses if transcribed and filed.

(d) The recognizance or undertaking for the appearance of the defendant.

(e) A copy of the order discharging or holding the defendant.

[548] (f) Every article, writing, money or other exhibits received in evidence provided, however, that such article, writing, money or other exhibits so used in evidence before said magistrate may be returned to the owner thereof upon a written order of the magistrate unless the State objects thereto in which case the trial Court will resolve the issue.

19. The following sanctions shall be imposed for failing to bring the defendant before a committing magistrate and/or for failure to hold a preliminary hearing:

(1) If, within twenty-four (24) hours after a defendant's arrest, a first appearance has not been held and/or a magistrate has not set bail for a defendant charged with an offense bailable as of right, the defendant shall immediately be released on his own recognizance.

(2) If a defendant is not afforded a preliminary hearing within the applicable period set forth in paragraph (8) herein and the hearing is not properly postponed or waived, then all charges

shall be withdrawn and the defendant, if incarcerated, shall immediately be released. The State shall be permitted to refile a charge so withdrawn, however, in the event a charge is twice withdrawn pursuant to this [549] provision, the defendant shall not again be held to answer to that charge except upon an indictment of the Grand Jury returned within thirty (30) days of the date of the second withdrawal.

Postponements may be granted in accordance with the Florida Rules of Criminal Procedure after notice to the parties and an opportunity to be heard.

20. In case of conflict between this plan and applicable Florida Statutes, Florida case law, or the Florida Rules of Criminal Procedure the three last mentioned authorities will apply to the extent that they are not inconsistent with the Court's Opinion and Final Judgment of October 12, 1971.

21. In order to accomplish the purposes of this plan the details herein may be altered as required to keep the system functioning without further approval by this Court.

22. This plan is not intended to apply to violations charged under the various municipal codes.

23. Each law enforcement agency will be responsible for the transportation of its own prisoners and it is not anticipated that this is a responsibility of Metropolitan Dade County.

24. This plan shall be put into effect within ninety (90 days from the date of this order.

II. The Motion of Defendant Gerstein for Rehearing and/or Clarification be and the same is hereby denied.

DONE AND ORDERED in Chambers at Miami, Florida this 25 day of January, 1972.

/s/ James Lawrence King

James Lawrence King
UNITED STATES
DISTRICT JUDGE

[1]
Copy to: Judge King

71-448-CIV-JLK

IN THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

NO. 72-1585

ROBERT PUGH and NATHANIEL HENDERSON, ET AL,
v.
JAMES RAINWATER, ET AL.

Appeal from the United States District Court
for the Southern District of Florida

(OCTOBER 24, 1972)

Before BROWN, Chief Judge, TUTTLE and INGRAHAM, Circuit Judges.

PER CURIAM:

It appearing that the order of the trial court in this case was stayed pending appeal by a panel of this court, and the case having now been argued in open court and submitted, it is now

ORDERED that the stay heretofore entered is hereby VACATED.

It having been made to appear on oral argument that, with the substantial acquiescence of the Attorney General of the State of Florida, measures have now been instituted to afford some of the relief relating to hearings to determine probable cause for arrest of members of the class represented by named plaintiffs, the trial court is directed to compare in detail the plan incorporated in its order with the present practice, and make specific findings in which it determines to what extent the present practice falls short of meeting constitutional requirements. A copy of its [2] findings shall be furnished to counsel and to this court.

Pending the completion of such inquiry, the trial court may put into effect such parts of its plan as are consistent with the proposed plan submitted to the court by Sheriff Purdy.

A true copy

Test: EDWARD W. WADSWORTH
Clerk, U.S. Court of Appeals, Fifth Circuit

By /s/ Carol A. Gaudet
Deputy

New Orleans, Louisiana

OCT 24 1972

[3]

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

No. 71-448-Civ-JLK

ROBERT PUGH and NATHANIEL HENDERSON,
on their own behalf and on behalf of all others
similarly situated, et al,
Plaintiffs,

vs.

JAMES RAINWATER, et al,
Defendants.

FINDINGS AND CONCLUSIONS RELATIVE THE COMMITTING MAGISTRATE SYSTEM OF DADE COUNTY, FLORIDA

[Filed February 16, 1973]

I

HISTORY

This action brought almost two years ago by Florida prisoners held for trial without ever having received an impartial judicial determination of probable cause for their detention, now comes before the court for detailed findings on the extent to which present state practice falls short of meeting constitutional requirements. In an order of October 12, 1972, this court initially ruled that both the fourth amendment and the due process clause of the fourteenth amendment require a prompt hearing before

a neutral and detached judicial officer for individuals held for trial solely upon an information filed by a single state attorney. Pugh v. Rainwater, 332 F.Supp. 1107 (S.D. Fla. 1971).

The court allowed defendants both before and after that ruling an opportunity to voluntarily bring Florida practice into compliance with basic constitutional standards. After this case was initiated on March 22, 1972, the court permitted the pre-trial schedule to be protracted in order that the 1971 Florida Legislature might have an opportunity to consider and act upon the issue. Likewise, the court's [4] October 25 order postponed the question of implementation to provide all defendants 60 days within which to avail themselves of the opportunity to submit proposals concerning what sort of system for providing prompt preliminary hearings by an impartial judicial officer should be adopted in Dade County, Florida. The only proposal submitted in response to the court's mandate, (which came from defendant E. Wilson Purdy, Sheriff of Dade County) suggested the creation of acommitting magistrate system.[1] In the absence of alternative proposals, the Purdy Plan, as it came to be known, was substantially adopted on January 25, 1972 after careful deliberation by the court. Pugh v. Rainwater, 336 F.Supp. 490 (S.D.Fla. 1972).

Implementation of the Purdy Plan was delayed at the request of defendants for 90 days to permit adequate time for necessary administrative arrangements. State Attorney Gerstein's subsequent request that the court further

[1]Defendant State Attorney Gerstein adopted Sheriff Purdy's plan, while reserving his right to pursue appellate remedies.

delay compliance, pending completion of an appeal, was denied. The Fifth Circuit Court of Appeals granted the requested stay by order of March 31, 1972.

Despite the Fifth Circuit stay, the Dade County judiciary officials moved voluntarily in the hiatus during appeal to establish their own plan for providing preliminary hearings. To effectuate this court's implementation order, a Committing Magistrate Rules Committee was formed by administrative order of Chief Judge Marshall C. Wiseheart of the Eleventh Judicial Circuit of Florida on March 13, 1972. After the stay had been issued, however, the work of the committee independently bore fruit as an administrative [5] order of the Chief Judge created a committing magistrate system on April 15, 1972, which provided a limited right to a preliminary hearing. Although the requirements of the Dade County Magistrate System did not entirely conform with those of this court's order or those of the Purdy Plan, the differences are now moot in view of subsequent developments.[2] In retrospect, it is only unfortunate that in spite of our efforts to secure alternative proposals, the court did not have the opportunity to consider the plan actually implemented.

The signal development, however, came with the issuance of Amended Rules of Criminal Procedure by the Florida Supreme Court on December 6, 1972. The Amended Rules, which took effect February 1, 1973, contain many of the safeguards contained in this court's plan of January 25, 1972, including provision for preliminary hearings

[2]It should be noted; although defendant State Attorney Gerstein acquiesced in the committing magistrate system, he reserved the right to continue to file direct informations with the Clerk of the Criminal Court of Record.

under a committing magistrate system. The State Supreme Court has once again demonstrated that it is not blind to the continued violation of 40-year old state statutes requiring an arresting officer to take the defendant before a committing magistrate without unnecessary delay. Fla. Stat. § § 901.06 901.23 (1971) (originally enacted as Law of June 12, 1939, ch. 19554, §§ 6, 23, [1939] Fla. Laws 1300); see e.g. State ex rel. Carty v. Purdy, 240 So.2d 480 (Fla. 1970); Milton v. Cochran, 147 So.2d 137 (Fla. 1962).

Upon hearing oral argument on October 18, 1972, in the appeal, the Fifth Circuit entered an order of October 24, [6] vacating its stay of our January 25, 1972 order, directing this court to make specific findings on the constitutional deficiencies of present practice, and authorizing the implementation of the Purdy Plan.[1] In accordance with that mandate, a hearing was set for November 16, 1972, but delayed at the request of defendants until January 18,

[1]The Fifth Circuit order stated:
"[I]t is now
"ORDERED that the stay order heretofore entered is hereby VACATED.
"It having been made to appear on oral argument that with substantial acquiescence of the Attorney General of the State of Florida, measures have now been instituted to afford some of the relief relating to hearings to determine probable cause for arrest of members of the class represented by named plaintiffs, the trial court is directed to compare in detail the plan incorporated in its order with the present practice, and make specific findings in which it determines to what extent the present practice falls short of meeting constitutional requirements. A copy of its findings shall be furnished to counsel and to this court.
"Pending the completion of such inquiry, the trial court may put into effect such parts of its plan as are consistent with the proposed plan submitted to the court by Sheriff Purdy."

1973. On the basis of the presentations of the parties and amicus curiae Dade County Bar Association at that hearing, the following findings of fact and conclusions of law are hereby entered.

The parties agreed and stipulated to the premise, in which the court concurs, that the mandated assessment of present practices must concern itself with state procedures after February 1, 1973, under the Florida Rules of Criminal Procedure as now amended. The parties further agreed and stipulated that, so viewed, only four aspects of present [7] practice differ from the court's plan of January 25, 1972, and remain to pose issues of constitutional dimension in this case.

II

THE PRESENT PRACTICE WHICH PERMITS THE STATE ATTORNEY TO FILE AN INFORMATION AND OBVIATE THE REQUIREMENTS OF A DETERMINATION OF PROBABLE CAUSE BY A NEUTRAL AND DETACHED MAGISTRATE DIFFERS FROM THE COURT'S PLAN AND VIOLATES THE FOURTH AMENDMENT AND THE DUE PROCESS CLAUSE OF THE FOURTEENTH AMENDMENT

Rule 3.131(a) of the Florida Rules of Criminal Procedures states:

> "A defendant, unless charged on an information or indictment has the right to a preliminary hearing on any felony charge against him.

The Rule is consistent with the longstanding law of Florida. State ex rel. Hardy v. Blount, 261 S.2d 172 (Fla. 1972).

The validity of this practice, which permits the State Attorney to be the sole arbiter of probable cause, has always been the main issue in this case.

Not only does the present practice permit the State Attorney to block a preliminary hearing, it also allows him to overrule a determination of no probable cause made by a magistrate by refiling an information. Therefore the whole preliminary hearing system is really conditioned upon the desires of the State Attorney. If he files an information prior to the preliminary hearing, none will take place. If he files an information after a magistrates detached and impartial determination of no probable cause, the accused may remain in jail until trial.

This practice cannot be reconciled with the constitutional requirement of the due process clause of the fourteenth amendment and the fourth amendment. The continuation of the practice is in clear conflict with the plan previously entered by the court and with the original decision of the court.

[8] In addition to the cases relied upon in that decision (at 336 F.Supp. 1107 et. seq.), recent Supreme Court decisions confirm that the deprivation of liberty caused by the prosecuting attorney without any judicial review is unconstitutional. See: Morrissey v. Brewer, ____ U.S. ____ 92 S.Ct. 2503 (June 29, 1972;) Fuentes v. Shevin, 92 U.S. 1983 (June 12, 1972); Stanley v. Illinois, ____ U.S. ____, 2 S.Ct. 1208 (April 3, 1972); Shadwick v.

City of Tampa, ____ U.S. ____, 92 S.Ct. 2119 (June 19 1972), and United States v. United States District Court, ____ U.S. ____, 92 S.Ct. 2125 (June 19, 1972).

III

THE PRESENT PRACTICE WHICH EXCLUDES MISDEMEANANTS FROM A PRELIMINARY HEARING DIFFERS FROM THE COURT'S PLAN AND VIOLATES THE FOURTH AMENDMENT AND THE DUE PROCESS AND EQUAL PROTECTION CLAUSES OF THE FOURTEENTH AMENDMENT.

Rule 3.13(a) of the Florida Rules of Criminal Procedure, as amended, authorizes hearings before a neutral and detached judicial officer only "on any felony charge." Thus, misdemeanants need not be afforded a preliminary hearing under the present practice, despite the fact that the preliminary hearing provisions of the amended rules provide the only guarantee of prompt determinations of probable cause. Consequently, the accused misdemeanant remains unprotected by present practices against deprivation of his liberty. As the court's original opinion made clear, this deprivation of liberty is particularly unjustifiable as a denial of due process for those misdemeanants who remain in custody without bond. Pugh v. Rainwater, 332 F.Supp. 1107 (S.D.Fla.1971); cf. Morrissey v. Brewer, ____ U.S.____, 92 S.Ct. 2593 (1972). The Court's plan to effectuate its original order, as well as the proposal of Sheriff Purdy, therefore made no distinction between felony cases and mis [9] demeanors.

However, it is well-settled that "once it is determined that due process applies, the question remains what process is due." Morrissey v. Brewer, 92 S.Ct. 2593, 2600 (1972). and that the process due depends on the extent to which an individual will be "condemned to suffer grievous loss." Joint Anti-Fascist Refugee Comm. v. McGrath, 341 U.S. 123, 168 (1951) (Frankfurther J., concurring), quoted in Goldberg v. Kelley, 397 U.S. 254, 263 (1970).

Although we think it clear that the deprivation to misdemeanants held in custody unable to meet their bond requires a prompt neutral probable cause determination, the question becomes more difficult as applied to misdemeanants out on bond and those who are charged with violating county ordinances which carry no penalty of imprisonment. We have therefore taken our cue from the Supreme Court in Argersinger v. Hamlin, 92 S.Ct. 2006 (1972) and concluded that a neutral determination of probable cause is required by the fourth amendment for all misdemeanants who face potential imprisonment.

However, we are unable to conclude that either due process or the fourth amendment requires a probable cause determination by a judicial officer for those misdemeanants accused of violations which carry no possible imprisonment. See Shadwick v. City of Tampa. We think that misdemeanants within this category can properly be screened by a State Attorney for the very reason that his office is not fundamentally concerned with the prosecutions of the barking dog variety, but screens them as a general rule at the request of complaining citizens.

Thus, the State Attorney may not constitutionally obviate preliminary hearings where a potential term of con[10]finement faces the misdemeanant.

The present practice, as embodied in the amended rule, suffers from an additional shortcoming. It creates a classification, based solely on the type of offense, which deprives accused misdemeanants, but not accused felons, of a right long recognized as "fundamental": the right not to be deprived of liberty without due process of law and consistent with the fourth amendment. Thus, although classification of crimes is ordinarily a matter left largely to the states, this categorization touches upon a right "that the court has come to regard as fundamental and that demand[s] the lofty requirement of a compelling governmental interest" to justify it. In re Kras, 41 U.S.L.W. 4117, 4121 (January 10, 1973), citing Shapiro v. Thompson, 394 U.S. 618, 638 (1969).

Two such state interests were advanced by defendants with the voluntary cooperation and testimony of the Hon. John A. Tanksley, Chief Judge of the Magistrate Division of the Eleventh Judicial Circuit, as sufficiently compelling to justify the classification. First, the state's interest in assuring misdemeanants a fair and impartial trial. Judge Tanksley testified that Justice Adkins of the Florida Supreme Court wished to inform the court that although the advisory committee which formulated the amended rules had recommended that preliminary hearings be afforded misdemeanants, the Florida Supreme Court had demurred from so providing because of its concern that the same magistrate who determined probable cause in a misdemeanor case might end up trying that very case thereby denying the defendant a fair and

impartial trial. Although the state's interest in providing fair and impartial fact-finders is doubtless both a laudable and compelling one, Judge Tanksley went on to testify that preliminary hearings and misdemeanor trials are conducted by [11] separate panels of judges under the present practice in Dade County. While he could not speak for practice in the remainder of the state, we are not in this suit faced with practices outside Dade County.

The second compelling interest suggested by defendants was that of expense to the state to provide preliminary hearings for misdemeanants Judge Tanksley testified that if the five Dade County Judges assigned as magistrates were to provide preliminary hearings for misdemeanors as well as felonies their caseload might increase by as much as 30 to 35,000 cases a year, or approximately 3,000 a month. He acknowledged, however, that these projections represented an upper limit, and that figure might be considerably reduced in practice due to waivers of preliminary hearings and guilty pleas. He also acknowledged that a large part of the misdemeanor caseload consists of county penal violations, formerly heard by justices of the peace, which are now classified as misdemeanors as a result of the state court reorganization act. He characterized these as the "barking dog" and "loud parties" cases. Since these cases, which do not involve potential imprisonment, are not affected by the court's order, we conclude that the increase in the magistrate's caseload from providing preliminary hearings to misdemeanants who face potential imprisonment will fall considerably short of Judge Tanksley's projection and, if substantial, will not be overly burdensome. The court, concludes, however, that while more magistrates as well as courtroom facilities may be needed as a result of our

order, and that costs may increase in the short run, it will not be a significant increase.

Judge Tanksley also testified, however, that despite dark predictions to the contrary by defendants at the time of this court's initial order, the magistrate's system has been [12] highly successful in felony cases. He estimated that, as a result of the magistrate system, felony caseloads have been reduced by 20 to 25 percent, with corresponding savings to the taxpayers of Dade County. We are pleased to learn that there is now evidence to support our prediction that

> "[t]he expense of maintaining a jail, with many persons who would never be there in the first instance if their case had been reviewed by a judge in an effective committing magistrate system, will be substantially less than its present cost and will certainly be a tangible benefit to all citizens of this community." 332 F.Supp. at 1114.

Although we acknowledge that a state has a proper interest in maintaining its fiscal integrity and may legitimately attempt to limit its expenditures, it is well settled that a state may not accomplish such a purpose by invidious distinctions between classes of its citizens. Shaprio v. Thompson, 394 U.S. 618, 633 (1969). In the case before us, defendants must do more than show that denying due process to misdemeanants will save money. In the absence of other suggestions of compelling interests, we must conclude that present practice deprives misdemeanants of equal protection of the law, in addition to due process and fourth amendment guarantees.

IV

THE PRESENT PRACTICES WHICH PROVIDE DIFFERENT TIMES FOR PRELIMINARY HEARINGS FOR THOSE CHARGED WITH CAPITAL OFFENSES OR OFFENSES PUNISHABLE BY LIFE IMPRISONMENT DIFFER FROM THE COURTS PLAN AND VIOLATE THE DUE PROCESS AND EQUAL PROTECTION CLAUSES OF THE FOURTEENTH AMENDMENT AND THE FOURTH AMENDMENT.

Rule 3.131(b) of the Florida Rules of Criminal Procedure provide:

> "In all cases where the defendant is in custody, except capital offenses or offenses punishable by life imprisonment, the preliminary hearing shall be held within 72 hours of the time of the defendant's first appearance. In all capital offenses and offenses punishable by life imprisonment and in all cases where the defendant is not in custody the preliminary hearing shall be held within seven days of the time of defendant's first appearance." (emphasis added).

[13] The present practice, as set forth in that rule, differs from the court's plan and Sheriff Purdy's plan only insofar as it excludes the two enumerated categories of offenses from the established time frame of four days.[4]

[4]The court plan had required initial appearance within three hours of arrest and preliminary hearing within four days thereafter. The new Florida Rules require initial appearance within 24 hours and preliminary hearing 72 hours (3 days) thereafter. Thus the crucial time of preliminary hearing is hastened by three hours under the Florida Rules, except for the persons falling into the classification set forth above.

By creating a separate classification for persons accused of capital offenses or offenses punishable by life imprisonment, the practice suffers an equal protection infirmity similar to that caused by the total exclusion of misdemeanants from a preliminary hearing. The court finds no compelling governmental interest which justifies the classification. cf. In re Kras, supra, and Shaprio v. Thompson, supra.

By failing to set the same time requirements for capital and life imprisonment cases as compared to other felonies, their present practice condones an extended deprivation of liberty without a hearing.

The timeliness of the preliminary hearing has been a constant concern of this court. The court recognizes that tolerating a deprivation of liberty for four days, absent a judicial determination of probable cause, is questionable. In Argersinger v. Hamlin, 407 U.S. 25 (1972) the court prohibited a denial of liberty for one day absent counsel. Here we are condoning a denial of liberty for four days absent a [14] hearing. Property rights have consistently been protected by a hearing prior to the taking. Fuentes v. Shevin, 407 U.S. 67 (1972).

Thus, while four days may be a reasonable time to allow witnesses to be summoned and other mechanical tasks performed, an eight day (24 hours for initial appearance plus seven days) deprivation of liberty is not reasonable. For the reasons set forth in the original Pugh

v. Rainwater decision and upon the recent decisions of the Supreme Court cited infra. The court finds that the present practice of not setting the same time requirement for all persons who will be proceeded against by information violates the fourth and fourteenth amendments.

V

THE FAILURE OF THE PRESENT PRACTICE TO PROVIDE SANCTIONS FOR FAILURE TO CONDUCT THE PRELIMINARY HEARING AND THE REFILING OF AN INFORMATION IF A DEFENDANT IS DISCHARGED DIFFERS FROM THE COURT PLAN AND RESULTS IN VIOLATION OF THE FOURTH AND FOURTEENTH AMENDMENTS.

The present practices provide no sanction for the failure to accord a preliminary hearing or for the refiling of an information after determination of no probable cause. They do not, because Florida law tolerates the use of the information process in lieu of a probable cause determination by a neutral and detached magistrate. Rule 3.131(a), Florida Rules of Criminal Procedure. The court plan did contain sanctions. If a preliminary hearing was not accorded within the time period set and there was not a waiver or proper postponement, then the defendant was to be discharged and the charges withdrawn. However they could be refiled, but if the preliminary hearing was not accorded thereafter, then the defendant was to be discharged and not held again to answer except upon an indictment returned within 30 days of the second withdrawal. Pugh v. Rainwater, 336 F.Supp. at 493. [15] If a magistrate made a determination of no probable

cause and discharged the defendant, the defendant could not be recharged except upon a grand jury indictment returned within thirty days of the discharge. Pugh v. Rainwater, 336 F.Supp. at 492.

The Court of Appeals requested this court to make specific findings to determine the extent to which the present practice is constitutionally invalid. The failure to provide sanctions is not, of itself, an unconstitutional infirmity. It is the failure to accord probable cause hearings, which offends the Constitution. Thus, the lack of sanctions is invalid only insofar as the failure to provide sanctions results in a system which tolerates the denial of, or overruling of, a preliminary hearing. This is a corollary of the very first finding made above.

The courts, for far too long, have been blind to what all others see. We have operated under a conceptualism which no longer corresponds to the reality in many parts of the nation as increasingly crowded criminal dockets. [sic] The hard fact is that in many of our overburdened judicial systems state as well as federal, it may be a matter of weeks before even direct informations are filed, as was the situation in Dade County when this suit was brought, and a matter of months before the accused is brought to trial. In the interim, those unable to post bail suffer what can only be understood as a grave deprivation of liberty, however it may be theoretically justified.

Therefore the court finds that the failure of the present practice to provide a remedy for the denial of a preliminary hearing or the overruling of a preliminary hearing by use of the information process, insofar as that failure tolerates and condones such denials or overrulings,

[16] results in a violation of the fourth and fourteenth amendments. See the cases cited in Pugh v. Rainwater, 332 F.Supp. 1107 (S.D.Fla. 1971) and the more recent cases of Morrissey v. Brewer, Fuentes v. Shevin, Stanley v. Illinois, Shadwick v. City of Tampa, and United States v. United States District Court, supra, which fully support the proposition that the taking of a person's liberty absent a hearing by a neutral and detached magistrate, is unconstitutional.

DONE and ORDERED in chambers at the United States District Courthouse, Miami, Dade County, Florida, this 16 day of February, 1973.

/s/ James Lawrence King

JAMES LAWRENCE KING
UNITED STATES DISTRICT JUDGE

June 1, 1973

TO ALL COUNSEL OF RECORD

No. 72-1585 — Pugh v. Rainwater

Gentlemen:

The Court has directed that this letter be sent.

A hurried reading of Judge King's memorandum order and opinion of February 16, 1973 (filed with this

Court on March 12, 1973) indicates to the Court that he has, in response to our previous order of October 24, 1972, and in accordance with a stipulation by the parties as to the effect of the promulgation of the new Florida Rules of Criminal Procedure on the pending appeal in the Fifth Circuit, undertaken to rule specifically on four aspects of the new rules:

(i) that insofar as Rule 3.131(a) still authorizes the incarceration of a person against whom an information has been filed without a probable cause hearing by a detached magistrate, it violates due process;

(ii) that the failure of the Rules to provide a probable cause hearing for misdemeanants denies that class of people both due process and equal protection;

(iii) that the allowance of different periods of delay prior to the probable cause hearing for those accused of felonies for which a life sentence could be imposed (7 days) than for those for whom a shorter limited period of imprisonment would be the maximum (3 days) denies those subject to the longer period of delay due process and equal protection; and

(iv) that insofar as the failure of the Florida Rules to provide explicit remedies for failure to comply with the requirements imposed by the holding as to (i) above sanctions or encourages the incarceration of defendants without a probable cause hearing it results in a violation of the Fourth and Fourteenth Amendments.

In order that the Court may have a full and proper understanding of the issues which it must now resolve in light of the changed factual circumstances in the Florida practice, the stipulation by the parties as to the effect of these changes on this case, and the subsequent opinion of Judge King of February 16, 1973, the Court directs counsel to file within 7 days from the receipt of this communication typewritten memoranda addressing themselves to the following issues as well as any not specified but which in counsel's opinion are related and significant.

First, to what extent does Judge King's order of February 16, 1973, supersede his prior formal definitive decree of January 25, 1972, 336 F.Supp. 490? [sic] Specifically, assuming that the declaratory provisions of Judge King's supplemental order of February 16, 1973, are sustained by this Court on appeal, to what extent are the very specific provisions of his prior decree either necessary or desireable? In this regard counsel should include with their memoranda a proposed order and decree which this Court could direct the District Court to enter dealing specifically with their contentions. This should be constructed so that each of the principal issues outlined are separately stated to permit ready adaptation depending on which, if any, of the holdings are sustained. Since this is so requested on the hypothesis that each is sustained, the Court is hopeful that all counsel could join in a proposed decree or at least indicate differences specifically. With the proposed decree(s) with explanatory memoranda the Court will be able to determine the extent to which the decree to be mandatad should or must contain definitive details as to mechanics, sanctions, and the like.

Second, our hurried consideration of the supplemental order raises some concern that there are no parties before the Court with standing to raise the equal protection issues treated in parts (ii) and (iii), supra, of Judge King's supplemental order. Are there any accused misdemeanants threatened with loss of liberty by the operation of the new Florida Rules before the Court? Are there any parties to this litigation who are accused of felonies which could result in a life sentence and who are substantially affected by the operation of the new Florida Rules so as to have standing to assert the claim that the longer period of delay violates equal protection?

Third, and in a more general sense, to what extent does the supplemental opinion and the stipulation of counsel alter, reduce or eliminate one or more or all of the objections or attacks made on the District Court's initial opinion and detailed decree which were the subject of this appeal as submitted on oral argument? In summary, just what if anything is left of this appeal?

The Court appreciates the continued cooperation of counsel. The memoranda are to be filed in clear typewritten copies, one to the Clerk, one copy to each of the Judges at his home station. These may be filed simultaneously with the privilege of replies, rejoinders, etc., as thought helpful.

Very truly yours,

/s/ Edward W. Wadsworth,

EDWARD W. WADSWORTH,
Clerk

cc: Honorable John R. Brown, Chief Judge
U.S. Court of Appeals
11501 U.S. Courthouse, 515 Rusk Ave.
Houston, Texas, 77002

Honorable Elbert P. Tuttle
U.S. Senior Circuit Judge
P.O. Box 893
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Honorable Joe Ingraham
U.S. Circuit Judge
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JOINT MEMORANDUM IN RESPONSE TO COURT'S LETTER OF JUNE 1, 1973

(Filed June 8, 1973)

Pursuant to the Court's letter of June 1, 1973, counsel for the plaintiffs, the amicus curiae and the State Attorney conferred and jointly submit this response to the Court.[1]

The Court asked this question: "In summary, just what if anything is left of this appeal?" The parties and amicus curiae all agree that the major substantive legal issue remains intact. That issue is,

> DO THE FOURTH AND FOURTEENTH AMENDMENTS REQUIRE THAT ONE WHO IS ARRESTED AND HELD FOR TRIAL BE GIVEN A HEARING BEFORE A JUDICIAL OFFICER TO DETERMINE PROBABLE CAUSE EVEN IF AN INFORMATION HAS BEEN FILED AGAINST HIM BY A STATE ATTORNEY?

The State Attorney's unequivocal position is, and has always been, that an information filed by him or one of his assistants is sufficient to determine probable cause

[1]Mr. Barry Richard, Assistant Attorney General, was unavailable for consultation. However Mr. Richard's concern in this case has been with the bail issue posed in the companion matter, No. 72-1223. Mr. Mellon, from the State Attorney's office has been solely responsible for the preliminary hearing issues which were the subject of the Court's letter. Mr. Mellon is a signatory to this memorandum.

and that the filing of an information obviates any right to a preliminary hearing before a judicial officer. That position is consistent with present and past Florida law. It is that issue which has been at the heart of this suit since its inception. If the Court inferred from Judge King's February 16, 1973, order that that controversy was stipulated away, it was mistaken. The plaintiffs and the amicus curiae agree that the issue posed is alive, and a continuing dispute.

• • • •

The Court asked: "... to what extent does Judge King's order of February 16, 1973, supersede his prior formal definitive decree of January 25, 1972, 336 F.Supp. 490?" and "... to what extent are the very specific provisions of his prior decree either necessary or desireable?"

The order at 336 F.Supp. 490 sets forth the procedures for implementing the substantive decision reported at 332 F.Supp. 1107. Given the plan instituted by the County and the new Florida Rules of Criminal Procedure, the parties agree (except as to two points set forth below) that the February 16, 1973, order does, in effect, supersede the mechanical plan. In other words, except in the two areas designated below, if the declaratory provisions of Judge King's February 16 order are sustained, there is no longer any need for this Court to issue an order detailing how a committing magistrate system must work.

The parties also agree that the February 16, 1973, order restates and amplifies the original order at 332 F.Supp. 1107.

• • • •

The two areas referred to above are these: (1) the time between arrest and preliminary hearing and (2) the sanctions.

(1) Judge King's order held: "If incarceration is ordered, the magistrate must immediately schedule a preliminary hearing to be held within four (4) days [of initial appearance]." 336 F.Supp. at 492. In his February 16 order Judge King noted that the new Florida Rules mandate preliminary hearing within 72 hours, or 3 days of initial appearance.[2] That appearance is required within 24 hours of arrest.[3] Thus the total time lapse between arrest and preliminary hearing appeared to Judge King to be 4 days, which would have been consistent with his previous order.

However, Rule 3.040 of the Florida Rules of Criminal Procedure states:

> "When the period of time prescribed or allowed shall be less than 7 days, intermediate Saturdays, Sundays and legal holidays shall be excluded in the computation."

Thus a six day lapse is tolerated. The plaintiffs and the amicus curiae believe that a four day lapse between arrest and determination of probable cause is the constitutionally tolerable maximum. Since due process usually requires a hearing prior to the taking of property or liberty, it is argued that a subsequent hearing must occur within the shortest possible time.

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[2]Rule 3.131(b), Florida Rules of Criminal Procedure.

[3]Rule 3.130(b)(1), Florida Rules of Criminal Procedure.

The State Attorney believes, inter alia,[4] that clerical or logistical needs, and laboratory analysis time in narcotics cases, necessitate the current time frame. Plaintiffs rejoinder is that more personnel should be hired.

• • • •

(2) The State Attorney does not agree with plaintiffs and amicus curiae regarding sanctions. The State Attorney's position is set forth in his supplemental letter.

The relevant sanction provisions of Judge King's original order were:

> "17. If the magistrate discharges the defendant, the defendant shall not be required to answer to a subsequent charge for the same offense(s) except upon an indictment by the Grand Jury which shall have been returned within thirty (30) days of the defendant's discharge."
> 336 F.Supp. at 492.

> "19 . . . . . (2) If a defendant is not afforded a preliminary hearing within the applicable period set forth in paragraph (8) herein and the hearing is not properly postponed or waived, then all charges shall be withdrawn and the defendant, if incarcerated, shall immediately be released. The State shall be permitted to refile a charge so withdrawn, however, in the event a charge is twice withdrawn pursuant to this provision, the defendant shall not again be held to answer to

[4]The State Attorney is filing a supplemental letter to elaborate on his position regarding this point and the sanction issue.

> that charge except upon an indictment of the Grand Jury returned within thirty (30) days of the date of the second withdrawal."
> 336 F.Supp. at 493.

Plaintiffs and amicus curiae agree that if the Court finds for the plaintiffs the sanctions set forth above are appropriate.

• • • •

In its letter, the Court asked for proposed orders and decrees with regard to the specific enforcement provisions. Since this memorandum has hopefully made it clear that only two areas need be addressed in that regard, undersigned counsel for plaintiffs and amicus curiae respectfully take the liberty of making those proposals within this memorandum.

As to sanctions, the plaintiffs and amicus curiae urge that the District Court be directed to enter a fresh order imposing the sanctions quoted above after discharge by a magistrate and for failure to provide preliminary hearings.

As to the appropriate time for preliminary hearings, plaintiffs and amicus curiae submit that this Court should, after it makes it substantive Fourth and Fourteenth Amendment conclusion, order:

> "That persons arrested an incarcerated shall be given a judicial hearing to determine probable

cause within four (4) days from the time of their arrest.[5]

The State Attorney objects to the four day period for the reasons mentioned above and those set forth in the supplemental letter to be filed by the State Attorney.

• • • •

The Court asked if the plaintiffs have standing to raise the equal protection issues relating to misdemeanants and felons charged with offenses carrying life sentences. All parties agree that plaintiffs have standing. Plaintiff Robert Pugh was charged with robbery (App. p.2) a crime which was, and is punishable by life imprisonment. Plaintiff Nathaniel Henderson was charged with assault and battery (App. p.19) which was, and is, a misdemeanor under Florida law. Both the original and intervening complaints were brought as class actions on behalf of all persons arrested by law enforcement officers in Dade County who are detained solely upon a direct information (App. 3, 40) and the Court below found that method of litigation to be appropriate. 332 F.Supp. 1107 at 1115.

• • • •

The undersigned counsel for the name parties respectfully submit this memorandum.

[5]For those persons not in custody, Florida Rule of Criminal Procedure 3.131(b) provides that the preliminary hearing be held within seven days of first appearance. Plaintiffs and amicus curiae have no objection to that time period.

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The opinion and judgment of the Fifth Circuit Court of Appeals is included in the printed Petition for Certiorari and appears there on pages 1-28.

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT.

No. 72-1585

ROBERT PUGH and NATHANIEL HENDERSON,
on their own behalf and on behalf of all
others similarly situated,
Plaintiffs-Appellees,

THOMAS TURNER and GARY FAULK,
on their own behalf and on behalf of all
others similarly situated,
Plaintiffs-Intervenors,

versus

JAMES RAINWATER, MORTON S. PERRY,
SIDNEY SEGALL, Judges, Etc., ET AL,
Defendants-Appellants.

[Filed September 18, 1973]

ON CONSIDERATION OF THE APPLICATION of the Appellants in the above numbered and entitled cause for a stay of the mandate of this Court therein, to enable Appellants to apply for and to obtain a writ of certiorari from the Supreme Court of the United States, IT IS ORDERED that the issue of the mandate of this Court in said cause be and the same is stayed for a period of thirty days; the stay to continue in force until the final disposition of the case by the Supreme Court, provided that within thirty days from the date of this order there shall be filed with the clerk of this Court the certificate of the clerk of the Supreme Court that certiorari

petition has been filed. It is further ordered that the clerk shall issue the mandate upon the filing of a copy of an order of the Supreme Court denying the writ, or upon the expiration of thirty days from the date of this order, unless the above mentioned certificate shall be filed with the clerk of this Court within that time.

/s/ [signature illegible]

UNITED STATES
CIRCUIT JUDGE

Dated: